

United States  
Circuit Court of Appeals<sup>9</sup>  
For the Ninth Circuit.

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FRANK ALVAU and HUMBERT ROSSI,  
Appellants,

vs.

UNITED STATES OF AMERICA,  
Appellee.

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Transcript of Record.

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Upon Appeal from the United States District Court  
for the Western District of Washington,  
Northern Division.

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FILED

APR 5 - 1929

PAUL P. GORLEN,  
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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(Wash. 8647)

United States District Court, Western District of  
Washington, Northern Division.

May, 1928, Term.

No. 12,622.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK ALVAU, *alias* FRANK ALVO, and  
HUMBERT ROSSI,

Defendants.

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\*Page-number appearing at the foot of page of original certified  
Transcript of Record.

## INDICTMENT.

Vio. Secs. 3266, 3281, and 3282, R. S.

United States of America,  
Western District of Washington,  
Northern Division,—ss.

The grand jurors of the United States of America, being duly selected, impaneled, sworn and charged to inquire within and for the Northern Division of the Western District of Washington, upon their oaths present: [2]

## COUNT I.

That FRANK ALVAU, *alias* FRANK ALVO and HUMBERT ROSSI, on or about the twelfth day of July, in the year of our Lord one thousand nine hundred and twenty-eight, about one mile south-east of Redondo, King County, Washington, and at certain premises known as the Frank Alvau premises, in the Northern Division of the Western District of Washington, within the jurisdiction of this Court and within the Internal Revenue Collection District of Washington, then and there being, did then and there knowingly, willfully, unlawfully, and feloniously make and ferment, approximately, one thousand (1000) gallons of a certain mash, wort, or wash, fit for distillation of spirits, in a certain building, to wit, the residence of the said Frank Alvau, not then and there a distillery duly authorized according to law; contrary to the form of the statute in such case made and pro-

vided, and against the peace and dignity of the United States of America. [3]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT II.

That FRANK ALVAU, *alias* FRANK ALVO and HUMBERT ROSSI, on or about the twelfth day of July, in the year of our Lord one thousand nine hundred and twenty-eight, about one mile south-east of Redondo, King County, Washington, and at certain premises known as the Frank Alvau premises, in the Northern Division of the Western District of Washington, within the jurisdiction of this Court, and within the Internal Revenue Collection District of Washington, then and there being, did then and there knowingly, willfully, unlawfully, and feloniously use a certain still for the purpose of distilling spirits, in a certain dwelling-house, to wit, the dwelling-house of the said Frank Alvau located on the said premises; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [4]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT III.

That FRANK ALVAU, *alias* FRANK ALVO and HUMBERT ROSSI, on or about the twelfth day of July, in the year of our Lord one thousand nine hundred and twenty-eight, about one mile south-east of Redondo, King County, Washington, and at

certain premises known as the Frank Alvo premises, in the Northern Division of the Western District of Washington, within the jurisdiction of this court, and within the Internal Revenue Collection District of Washington, then and there being, did then and there knowingly, willfully, unlawfully, and feloniously carry on the business of a distiller of spirits, without having given bond as required by law; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

ANTHONY SAVAGE,

United States Attorney.

PAUL D. COLES,

Assistant United States Attorney.

[Endorsed]: Presented to the Court by the Foreman of the Grand Jury in open court, in the Presence of the Grand Jury, and Filed in the U. S. District Court Sep. 21, 1928. Ed. M. Lakin, Clerk. By S. E. Leitch, Deputy. [5]

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[Title of Court and Cause.]

ARRAIGNMENT AND PLEA (FRANK ALVAU).

Now, on this 1st day of October, 1928, defendant Frank Alvau comes into open court for arraignment and answers that his true name is Frank Alvau. He waives an attorney and enters his plea of not guilty. Said cause is set for November 19, 1928, for assignment.

[Title of Cause.]

ARRAIGNMENT AND PLEA (HUMBERT  
ROSSI).

Now, on this 1st day of October, 1928, defendant Humbert Rossi comes into open court for arraignment and answers that his true name is Humbert Rossi. He waives an attorney and enters his plea of not guilty. Said cause is continued to November 19, 1928, for assignment.

Recorded in Journal No. 16, at page 326. [6]

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[Title of Court and Cause.]

PETITION TO SUPPRESS EVIDENCE.

Comes now the defendant, Frank Alvau, and petitions the Court to suppress the things and articles seized at the residence and home of the said petitioner and his wife and family, at Redondo, in the County of King and State of Washington, for the reasons and upon the grounds:

I.

That your petitioner, on or about and prior to the 12th day of July, 1928, and also subsequent thereto, resided with his family on a ranch of 14 acres, consisting of a private dwelling-house, which was his residence at the time of the unlawful search and seizure complained of in this proceeding, and the private dwelling-house of the said petitioner was searched, and an unlawful seizure made there-

from, without a search-warrant, and without any warrant whatsoever, or authority of law, under the following facts and circumstances:

That the prohibition agents in the night-time, on the said 12th day of July, 1928, at about three A. M. o'clock, without a search-warrant, and without any warrant whatsoever, and without authority of law, battered down the door of the private dwelling-house of the petitioner and his said family, breaking the door-sill and the lock that securely fastened the same, and without due process of law or any legal authority whatsoever, unlawfully and wrongfully entered [7] the private dwelling-house of your petitioner and his family, and proceeded to search the said private dwelling-house, stating to your petitioner that they were prohibition agents, and upon being requested for their authority and a search-warrant, if any they had, by your petitioner, they stated that they did not need a search-warrant but had a right to search without any warrant whatsoever.

That thereafter the said search continued for a period of nearly five hours, and during said period the said officers moved about the personal belongings of the said petitioner in the said premises, and unlawfully and illegally searched and seized certain articles without any search-warrant whatsoever, and in violation of the constitutional rights of your petitioner under the Fourth and Fifth Amendments to the Constitution of the United States, and in violation of Article I, Sections 6 and 9, of the Constitution of the State of Washington, guarantee-

ing a person against unlawful search and seizure in his home.

II.

That the said search and seizure were illegal and unlawful in that the same were an invasion of the constitutional rights and privileges of the said defendant, in that the search was made in the nighttime, and further, in that the said agent executing the said search was not an Internal Revenue Officer, but was a deputy or assistant Federal Prohibition Agent, unauthorized to make a search and seizure without due process of law.

III.

That the said search and seizure were in violation of the constitutional privileges of your petitioner, contrary to the provisions of the Constitution of the United States, and the constitution of the State of Washington. [8]

IV.

That no business of any kind is transacted or carried on in petitioner's said dwelling-house, by petitioner, and no intoxicating liquor is unlawfully sold thereon, and the said dwelling-house is occupied and used solely as a private dwelling, by petitioner and his family.

V.

That there was no affidavit or complaint upon which a lawful and valid search-warrant could issue, showing that intoxicating liquor containing more than one-half of one per cent by volume, and fit for use for beverage purposes, was unlawfully

possessed in the said dwelling-house or by your petitioner, and that there was no complaint or affidavit which set forth facts upon which probable cause for belief that such intoxicating liquor was so possessed or could be found.

#### VI.

That there was no complaint or affidavit whatsoever containing a statement of facts upon which the existence of probable cause for the issuance of a warrant could be found.

#### VII.

That there was no complaint or affidavit describing the premises directed to be searched, or any search-warrant whatsoever, and the said premises were not particularly and definitely described in any search-warrant directed against said premises. That there was no search-warrant executed by a person to whom it could have been directed.

#### VIII.

That without any warrant whatsoever, a private dwelling-house in which intoxicating liquor was not unlawfully sold was searched. [9]

WHEREFORE, your petitioner prays that the said articles so seized, and all of the evidence derived or gained from said unlawful search and seizure, be suppressed, and that the District Attorney and the Federal Prohibition Agents be restrained from making any use of the things found and the information gained as a result of said search, and



for such other and further relief granted to your petitioner as to this Court may seem just.

JOHN B. WRIGHT,  
EDWARD H. CHAVELLE,

Attorneys for Defendant.

315 Lyon Building, Seattle, Washington. [10]

United States of America,  
Western District of Washington,  
Northern Division,—ss.

Frank Alvau, being first duly sworn, on oath deposes and says: That he is the petitioner named in the foregoing petition to suppress evidence; that he has read the said petition, knows the contents thereof, and believes the same to be true.

FRANK ALVAU.

Subscribed and sworn to before me this 17th day of July, 1928.

[Seal] EDWARD H. CHAVELLE,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

[Endorsed]: Filed Sep. 28, 1928. [11]

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[Title of Court and Cause.]

AFFIDAVIT OF FRANK ALVAU IN SUP-  
PORT OF PETITION TO SUPPRESS EVI-  
DENCE.

United States of America,  
Western District of Washington,  
Northern Division,—ss.

Frank Alvau, being first duly sworn, on oath de-

poses and says: That he is one of the defendants above named; that he resides at Redondo, in King County, State of Washington, on a ranch where he resides with his wife and children, and which said home he is purchasing on a real estate contract; that the said dwelling-house consists of six rooms and basement, and is located on about 14 acres of ground about 1200 feet from the highway nearest adjacent to said property, and that *there* resided there on the 12th day of July, 1928, and for a period of more than two years prior thereto and subsequent thereto, the said affiant and his wife and children; that on the said 12th day of July, 1928, in the night-time, at about three A. M. o'clock on said date, certain prohibition agents entered the said premises of the said affiant, by battering down a door to the dwelling-house, which was securely fastened and locked, and breaking the sill of said doorway, and the said lock, and entered the said dwelling-house herebefore described, and immediately proceeded to search the same, without any legal or lawful search-warrant, and without any warrant whatsoever, and took from the premises certain articles; that no search-warrant was served or any left in the premises, and that [12] the said search and seizure were illegal and unlawful, as in violation of the constitutional rights of the defendant under the Fourth and Fifth Amendments to the Constitution of the United States, and in violation of the constitution of the State of Washington, Article I, Sections 6 and 9, and further, in violation of affiant's constitutional rights, in that

said articles were seized and taken from the premises without any legal or lawful search-warrant, or any search-warrant whatsoever.

FRANK ALVAU.

Subscribed and sworn to before me this 17th day of July, 1928.

[Seal] EDWARD H. CHAVELLE,  
Notary Public in and for the State of Washington,  
Residing at Seattle. [13]

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[Title of Court and Cause.]

COMMISSIONER'S HEARING.

BE IT REMEMBERED that on the 20th day of July, 1928, at the hour of 2:00 o'clock P. M., the above-entitled cause came on for hearing before the Honorable G. H. Fitch, the United States Commissioner for the above-entitled district, in the city of Tacoma, Washington, the plaintiff appearing by the Honorable John T. McCutcheon, duly appointed, qualified and acting Assistant United States Attorney, in and for the United States District Court of the Western District of Washington, Southern Division; and the defendants appearing in person and by their attorney, the Honorable Edward H. Chavelle. The Government having announced it was ready to be heard, the witness was called and duly sworn, according to law.

WHEREUPON the following proceedings were had and testimony given in behalf of the Government, to wit: [14]

TESTIMONY OF W. H. KINNAIRD, FOR THE  
GOVERNMENT.

W. H. KINNAIRD, called as a witness on behalf of the Government, after having been duly sworn, was examined and testified as follows:

Direct Examination.

(By Mr. McCUTCHEON.)

Q. Mr. Kinnaird, inquiring into the case against H. Rossi and Frank Alvau you might tell what you know about this.

A. On July 12th at about 7:00 o'clock I left Tacoma and went to the premises of Frank Alvau, near Redondo, with Agents Carr and Rainey. Agent Griffith was on the place when we arrived. I could smell the distillery, and the kerosene fumes.

Mr. CHAVELLE.—You could smell what?

A. The distillery and the fumes of kerosene.

A. (Continuing.) I walked toward this odor and it was more pronounced near the cellar. I walked into the cellar and I couldn't smell it so plain because there was some goat cheese that deodorized the place to a certain extent. After searching for some time I noticed a washing-machine, and I moved that back and found an entrance to a sub-cellar, which was immediately off this false room. I began to push on the door and H. Rossi opened the door. There was a large distillery, and I told him to turn on the light. He did and closed the hole back up. We later went in and found a large

(Testimony of W. H. Kinnaird.)

distillery and mash and whiskey and other utensils.

Q. Had the distillery been operated? [15]

A. Yes, sir.

Q. Recently? A. Yes, sir.

Q. How much mash,—how much of a distillery was it? A. A thousand gallons.

Q. Was it in the state of fermentation?

A. Yes, sir.

Q. Where was Frank Alvau at that time?

A. I don't know.

Q. What is his connection with the distillery?

A. He lives there.

Mr. CHAVELLE.—I object to anything further,—

Q. I will ask you what else you did, what other connection he had there.

A. He ran the distillery there.

Mr. CHAVELLE.—I object to that. How does he know?

The COURT.—Go ahead and answer.

A. He told me he ran the distillery there.

Mr. McCUTCHEON.—Cross-examine.

Cross-examination.

(By Mr. CHAVELLE.)

Q. Now, you went to the premises of this man, which were in their character a private dwelling?

A. Yes, sir.

Q. And there lived a family there consisting of wife and children? A. Yes, sir. [16]

(Testimony of W. H. Kinnaird.)

Q. They had lived there for some time?

A. I couldn't tell how long they lived there.

Q. What is the description of the property? Is it a ranch, or farm?

A. It could be used as one, but it wasn't being used as such.

Q. Was the place planted in tomatoes, potatoes, beans and other vegetables?

A. There was a garden there, yes.

Q. How far from the highway was the dwelling-house?

A. About three hundred yards from the highway.

Q. Three hundred yards. Nine hundred feet?

A. I should say something like that.

Q. Was there a fence around the place?

A. Yes, I think there is.

Q. You entered this enclosure and broke into the house?

A. You know I didn't say I broke into the house.

Q. Did you?     A. I did not.

Q. Then, how did you get in?

A. I walked into the door.

Q. Which door?     A. Cellar door.

Q. Wasn't it locked?     A. No, sir.

Q. As a matter of fact, didn't you or the agents ram or jam the door, so that it was broken?

A. Not while I was there.

Q. Did the agents do it before you was there?

[17]     A. I couldn't say.

Q. They were there first?     A. First, yes.

(Testimony of W. H. Kinnaird.)

Q. Didn't you notice the sill of the cellar door broken?     A. No, sir.

Q. Did you say anything to anyone when you went into the house? Tell them who you were?

A. Yes, sir.

Q. Who did you talk to?     A. Frank's wife.

Q. Did you tell her you had a search-warrant?

A. No, sir.

Q. Did you have a search-warrant?

A. No, sir.

Q. Did she ask for a search-warrant?

A. Not me; no, sir.

Q. Didn't you tell her you did not need a search-warrant to search for a still?     A. No, sir.

Q. You didn't tell her that?     A. No, sir.

Q. Did you show her your badge?     A. No, sir.

Q. Did you see any of the other agents show their badge to her?

A. No, sir. I don't know whether they showed their badge or not

Q. Was the other agent there? [18]

A. One of them.

Q. Who?     A. Agent Griffith.

Q. He had gained entrance to the house before you got there?     A. I presume he had.

Q. What time of day did he get into the house?

A. Now, Mr. Chavelle, you know that is silly to ask me that. I don't know.

Q. Was it 3:00 o'clock in the morning?

A. I don't know.

Q. Would you say it was?     A. I don't know.

(Testimony of W. H. Kinnaird.)

Q. They didn't leave you to go there?

A. I don't know.

Q. Where did they leave you to go there?

A. I don't know.

Q. Did you hear the remark made that they had searched the premises before you got there?

A. I imagine they had.

Q. Did one of them tell you there was nothing there, the only thing they smelled was the goat cheese?

A. No, sir. They told me the distillery was in operation.

Q. You searched the premises?      A. I did.

Q. You spent some time searching?      A. I did.

Q. How long? Four or five hours?

A. No, sir. [19]

Q. How long?

A. I found it about 8:00 o'clock in the morning. I got there about 7:30.

Q. You searched the premises an hour?

A. Yes, sir.

Q. How long had they searched before you got there?      A. I don't know.

Q. They hadn't found any contraband before you got there?

A. Well, they knew the still was there.

Q. I say they hadn't found any contraband before you got there?      A. No, sir.

Q. Can you describe the premises?

A. I think I can.

Q. A dwelling-house?      A. Yes, sir.



(Testimony of W. H. Kinnaird.)

Q. How many bedrooms? A. Two.

Q. A kitchen A. Yes, sir.

Q. Basement? A. Yes, sir.

Q. An attic?

A. I don't know. I think there is an attic.

Q. Living-room? A. Yes, sir.

Q. You were thru all of those in your search?

A. No, not in my search. [20]

Q. But you were thru all of them?

A. Yes, sir.

Q. And you say a woman purported to be the wife of Frank Alvau? A. Yes, sir.

Q. Two children? A. Yes, sir.

Q. They lived in the house? A. Yes, sir.

Q. But Frank was not there? A. No, sir.

Q. He was not there when the search was made?

A. Yes, he was there.

Q. But he came in afterwards, you say?

A. He told me that.

Mr. CHAVELLE.—I ask to strike that.

A. He came in afterwards, yes.

Q. I thought you said he told you.

Q. Yes. But we talked about it.

Q. There was no evidence of a sale on those premises prior to this seizure?

A. I don't know about it.

Q. Well, you would know?

A. I don't know what transpired.

Q. So far as you know there was none made?

A. I couldn't say positively.

Q. So far as you know?

(Testimony of W. H. Kinnaird.)

A. I said not that I know of. [21]

A. As a result of the search you seized some articles? Yes, or no? A. Yes.

Q. Did you take a gun? A. I did not.

Q. Did any of your agents take a gun? A. Yes.

Q. That is in your possession now?

A. Yes, sir.

Q. Did you give any receipt for the articles you received—the gun and other articles?

A. No, sir,—what other articles do you mean?

Q. Any. Did you give any receipt for them?

A. No, sir.

Q. This place was not a store?

A. It was a distillery.

Q. I say it was not a store? A. No, sir.

Q. Or shop, or saloon, hotel, boarding-house?

A. It was a liquor manufacturing plant.

Q. I say, was it any of those things?

A. It might have been a saloon.

Q. Was there any evidence of intoxicating liquor being sold there? A. Yes.

Q. You answered “no” a while ago. You said there was no evidence of intoxicating liquor being sold there. Do you desire to change your statement, Mr. Kinnaird? [22]

A. Yes. He told me he did.

Mr. McCUTCHEON.—I object.

The COURT.—Go ahead.

Q. That was after you gained entrance, after your search? A. Yes, sir.

Q. Did you warn them,—

(Testimony of W. H. Kinnaird.)

A. Oh, Frank is a very nice sort of a fellow. He is all right.

Q. Yes. He is so nice he wanted to get into jail.

A. He will if some of these lawyers get a hold of him.

Q. Do you think that is humorous? When you went in there you were looking for some tangible evidence,—

A. I wasn't, no.

Q. You went in there looking for a still?

A. I went in there with the other agents. They found it. They called me in.

Q. They didn't know the still was there until they found it?

A. I knew it was there before I found it.

Q. Had someone advised you that the still was there?

A. Yes, sir.

Q. Told you the still was there?

A. No. They didn't tell me the still was there, but they said it was a suspicious place, and I sent the boys out to see.

Q. It was upon that information that you sent them out?

A. There were various smells out there, and I sent them out.

Q. Was that the same night they entered the place? [23]

A. It wasn't night.

Q. Well, when was it? They went out there and came back and told you the still was there but couldn't find it?

A. They could smell the fumes.

Q. So they had been over this place and made

(Testimony of W. H. Kinnaird.)

a search and found nothing, then they came and got you?   A. Yes.

Q. At Tacoma?   A. Yes.

Q. And the place is at Redondo?   A. Yes.

Q. How far is that.   A. Twelve miles.

Q. And you went back with them?

A. I went back with two of them.

Q. You think three or four hours elapsed before the time that you got back there at 7:30?

A. I don't know.

Q. Don't you keep any record of your officers' movements?

A. I can't tell. I'll testify to what time they got out there.

Q. Do you know?   A. I have their record.

Q. What time did they say they got out there?

A. Three o'clock in the morning.

Q. That is their record, is it?   A. Yes.

Q. And does their record show they broke down the door to [24] gain entrance to the premises?

A. No.

Q. Have you got the record?

A. I don't have a report till I get their names.

Q. Have you got their names? You have the record. Can you refresh your recollection from it?   A. What record are you referring to?

Mr. McCUTCHEON.—I object to that question of the record.

The COURT.—Objection is sustained.

Mr. CHAVELLE.—He refreshed his recollection from it.   A. I did not.

(Testimony of W. H. Kinnaird.)

Mr. CHAVELLE.—He said it was 3 o'clock in the morning. He said it was in the record. It is a search in the night, your Honor.

The COURT.—I sustain the objection.

Mr. McCUTCHEON.—That is hearsay and I move it be stricken.

The COURT.—I grant the motion and sustain the objection.

Mr. CHAVELLE.—That is striking what he said the official records show.

Q. Is this an official record?

A. It is a daily report.

Q. It is a part of your daily record, the original entry? They make the case report?

A. They don't make any case report. We make the reports from those daily reports. [25]

Q. You said so.

A. No, the daily report is the arrests they make and what time they go to places and things like that.

Q. The facts. And do they put on this report the time they arrive at a place?

A. They should, yes.

Q. And you use those in making up your case report?

A. No, they don't. They use a book like this (indicating).

Q. And that report is a part of the record of your office? A. I keep a daily report, sure.

Mr. CHAVELLE.—I submit, your Honor, that under the official record,—

(Testimony of W. H. Kinnaird.)

The COURT.—I can't see the materiality at all.

Mr. CHAVELLE.—I understand the motion was not on the cross-examination.

Mr. McCUTCHEON.—I move it be stricken on the grounds of not proper cross-examination.

The COURT.—I want to give you all the latitude possible on this.

Mr. CHAVELLE.—Yes, I appreciate that. But this is a dwelling-house and they went out there and searched it.

The COURT.—If he had his record here to refresh his memory, but he don't seem to have it.

Mr. CHAVELLE.—Yes, your Honor. But I thought I was well within my rights. He said he refreshed his memory—they got there at 3:00 o'clock.

The COURT.—Yes. You pressed him on it. But go ahead. I will let him testify to anything he knows [26] about it.

Q. Have you the record with you?

A. No, I haven't.

Mr. McCUTCHEON.—I object to that as improper cross-examination, and not gone over in the direct examination.

The COURT.—He may answer.

A. (Continuing.) They are over in my office.

Q. Your sending the agents out here was based upon this suspicion you referred to that the place was a suspicious place.

A. I told them there was a still out there.

Q. But you had never been out there?

(Testimony of W. H. Kinnaird.)

A. Yes, sir.

Q. Before this time. A. I have.

Q. You said somebody called and reported that it was a suspicious looking place.

A. Just a minute now. They told me about the odor there. And they said Frank would run them away when anyone came around there to pick flowers. I was out at Redondo and I smelt the odor and sent the agents out there.

Q. You said a few minutes ago somebody in the office reported it to you.

A. I didn't say somebody in the office.

Q. You are right. You said somebody around there.

A. He said the still was there, underground.

Q. And then you went out? [27]

A. And he told me what happened—that Frank would run him away with a gun whenever they would come around there.

Q. He thought burglars were there?

Mr. McCUTCHEON.—I object to what he thought.

Q. I say, what was his object in running for a gun? Not to kill a prohibition agent?

A. No. Hijackers. Well, Frank is all right.

Q. Just a minute. Nobody has asked you anything. Did you make a return in this case?

A. A return of what?

Q. What you saw? A. I did not.

Q. Since you seized this liquor what have you done with it? Where do you keep it?

(Testimony of W. H. Kinnaird.)

A. I have it in my vault.

Q. I thought you said when you came in here to-day you did not have it in your vault.

Mr. McCUTCHEON.—I don't think that is material in this case, what he did with it.

The COURT.—He can answer.

A. I took it right into the vault and locked it.

Q. What did you bring it up here to-day for?

A. I didn't.

Q. Didn't you bring that up here to-day?

A. That I brought up here is for another case. I am keeping it right with me.

Q. You are afraid of it?

A. No, I am not afraid of it, but I know what you attorneys [28] do. And I am keeping it right with me.

Q. You have sole access to the vault?

A. I have unless somebody is with me. Nobody else carries a key except myself.

Q. Was it in this District?

A. It was in this District, but in a different division. It happened in the Northern Division.

Q. You can assure me can't you, or it is a fact isn't it, Mr. Kinnaird, that there was no search-warrant?

Mr. McCUTCHEON.—I object. That has been answered, a dozen times.

Mr. CHAVELLE.—He said he didn't have a search-warrant.

The COURT.—He can answer.

A. No, sir.



(Testimony of W. H. Kinnaird.)

Q. You had no search-warrant?

A. No search-warrant.

Mr. McCUTCHEON.—We admit there was no search-warrant in this case.

Mr. CHAVELLE.—Let that appear in the record—there was no search-warrant.

Q. How long a period elapsed between the time you were out there the first time,—by the way were you on the premises the first time you were out there? A. What do you mean?

Q. The dwelling-house?

A. What do you mean the first time?

Q. Prior to when these agents went there? [29]

A. I told you it was 7:30.

Q. That was the first time you saw this dwelling-house? A. No, sir.

Q. When had you seen it previous to this time when you got out there at 7:30 and the agents were there before you? A. Two weeks.

Q. Had you been on the ranch? A. No, sir.

Q. This house is pretty well located in the acreage? A. I couldn't say.

Q. Had you been inside of the yard, so to speak, or— A. No, sir.

Q. On the highway? A. Yes, sir.

Q. How many yards from the house.

A. About 300 yards.

Q. Was anyone with you then?

Mr. McCUTCHEON.—I object as improper.

The COURT.—I am going to sustain that objection. It was all before the search.

(Testimony of W. H. Kinnaird.)

Mr. CHAVELLE.—I had a reason, your Honor. I always dislike to state my reason. I don't know whether it is a good one or not.

The COURT.—I am willing to give you all the leeway possible.

Q. And they,—after that time someone told you that was a suspicious place. [30]

Mr. McCUTCHEON.—I object, That has all been gone over.

Q. When the agent was there, did you hear about the place?

Mr. McCUTCHEON.—I object.

The COURT.—Go ahead and answer.

A. I didn't hear about it after the agents went there.

Q. During the interim when you passed the house and the time you sent the agents, you heard about it?

A. Let me answer. They told me about the fellows picking flowers and about Frank chasing them away with a gun. And they concluded there must be a still there, and immediately came and asked me to investigate.

Q. And you investigated on this morning of the seizure? Is that right? A. Yes, sir.

Mr. CHAVELLE.—I think that is all.

#### Redirect Examination.

(By Mr. McCUTCHEON.)

Q. You personally found the still? A. I did.

Q. What kind of a gun was it? A. 38 special.

Mr. McCUTCHEON.—That is all. [31]

Mr. CHAVELLE.—Your Honor, is that all?

Mr. McCUTCHEON.—That is all.

The COURT.—Let this record show that the defendants heretofore have both been arraigned and plead “not guilty.”

Mr. CHAVELLE. — The record will so show. Your Honor, in this case I am making at this time a motion to suppress the evidence. It appears clearly that the premises in question are a dwelling-house in character. They are not any of the places described by law—a store, saloon, shop, hotel. But there is a man living there. A man, a wife and two children living in a house with two bedrooms, a living-room, a kitchen. There was some question about an attic. There was no evidence of the sale of intoxicating liquor. In the night-time, or if the Court desires—I think the Court can take legal cognizance of that—it was in the night-time, these premises were entered without a warrant, searched without a warrant. Of course the Court knows it doesn't matter if there was a still here in operation, the place is still in the character a dwelling-house, nothing but a dwelling-house. Therefore, in order to enter the premises there would have had to have been a valid, legal search-warrant, and in order to secure that there would have had to be a showing, and a showing would require necessary facts to procure a search-warrant, would require that facts were stated to show probable cause and offenses committed, to show by conclusion of the witness there was a still there. [32] The statement of the

(Testimony of W. H. Kinnaird.)

fact that he had a suspicion there was a still there would be no evidence of the character and type that could go to a jury; and that is the kind of evidence that would be necessary to set forth in the affidavit for service in order to procure lawful and legal search-warrant. As the law classified it, it must be that class of evidence before it could go to a jury. He says that someone told him that the people out there were acting very queer. To put the most liberal construction on it, they wouldn't let people enter to pick flowers, that there was something strange about the house. He asked them if they smelt anything and they told him "yes" and he arrived at a conclusion, or belief, there was a still there. So he sent a man out, and then went out and found a still. When they entered the place, they were looking,—they entered under a suspicion. They were looking for evidence which they could take to the jury. The same character of evidence. It was in the night-time. There had been no description of any article or things to be seized. They did not know when they entered there whether they were going to find anything or not. The witness also said when he got in there that the cheese so deodorized the place that he couldn't smell it. There was a long search. There was no offense committed in their presence. They went in there to look for an offense, to find evidence. Our Circuit Court has time and again said there can be no search of a dwelling. [33] In 299 Federal, they now say no dwelling-house can be searched unless

(Testimony of W. H. Kinnaird.)

evidence of a sale is found. In the Temperani case, there was a garage underneath the house. The officers said when they went by they smelt the fumes of a still in operation. They entered the garage, which was a part of the house. It was a cottage and the garage was joined, built into the house, although it was separated from the house. Judge Rudkin, speaking for the Court says that the agents entered and discovered stills in operation. But he said they entered to get the evidence, not because a crime was committed in their presence. There was no crime. Judge Rudkin said in that case that the constitutional rights of people will not be invaded by a lawful search and seizure, even under the circumstances where there was no denial of the evidence. The house was upon the street and the men passed upon the sidewalk and smelt the fumes.

Now, this house was back where there was no probability of their having smelt the odor. They only put that into the case to make the case difficult. In other words to add an element, but they are defeated. These men say themselves they were suspicious. And the officer sent the agents out, not because a crime was committed in their presence, but because they had suspicions, and they searched the house without any lawful warrant whatever.

Under the circumstances, your Honor, I don't know of a clearer case where a motion for suppression of the evidence should be granted. [34]

The COURT.—I take it for granted that you meant the owner of the premises.

Mr. CHAVELLE.—Your Honor, in order to make a motion to suppress the evidence, I would have to admit the facts of course, that Frank Alvau, one of the defendants,—the record may show it is for Frank Alvau only, that occupies these premises and is owner of the premises, that he occupies these premises with his family and is owner of the premises, or is buying it under a contract.

The COURT.—And is owner of the still.

Mr. CHAVELLE.—Not at all. I deny that.

The COURT.—I don't know what right we would have to suppress the evidence. He was there.

Mr. CHAVELLE.—He is the owner of the premises. In making the motion, he don't have to admit he is the owner of the still. And he don't; he denies it.

Mr. McCUTCHEON.—Your Honor, if he denies the ownership of the still we will charge him under the revenue bond. If he denies operation of that still, ownership of the apparatus, if he denies all connection with the ownership I don't see what there is to suppress on.

Mr. CHAVELLE.—Because the premises were entered unlawfully and articles were seized.

Mr. McCUTCHEON.—They didn't seize anything.

Mr. CHAVELLE.—They seized the gun, and other articles were seized. And there was no receipt given for the articles seized. [35]

The COURT.—I think under the Temperani case it wasn't necessary to give a receipt. It is not nec-

essary to make a return on the search-warrant. It is not necessary under the jurisdiction of this District.

Mr. CHAVELLE.—This is not in this district of course. The Court must consider that, I suppose.

Mr. McCUTCHEON.—That case under 299, is that a Volstead or Revenue?

Mr. CHAVELLE.—Under the National Prohibition Act you can't search a dwelling.

Mr. McCUTCHEON.—We haven't charged him under the Prohibition Act, but under the Revenue Act.

The COURT.—37 PC—Conspiracy.

Mr. McCUTCHEON.—I don't think it is charged.

The COURT.—Yes, it is.

Mr. McCUTCHEON.—This says in part,—  
(reading).

Mr. CHAVELLE.—Our Circuit has not laid down any such law.

The COURT.—There is a distinction between a charge under the Internal Revenue Act and the Volstead or National Prohibition Act. Judge Cushman has always held,—

Mr. CHAVELLE.—Our Circuit Court has not made any.

The COURT.—You will find,—

Mr. CHAVELLE.—You will find our Circuit Court is upheld.

The COURT.—You will find it pretty well di-

vided. There is quite a distinction in the law.  
[36]

Mr. CHAVELLE.—Here is the ruling we have had over at Seattle. Judge Neterer has sustained a motion of this act. He went so far here the other day in a narcotic case,—

The COURT.—That is different.

Mr. CHAVELLE.—They were charged under the right to collect revenue,—

The COURT.—Oh, I see.

Mr. CHAVELLE.—The agent testified they had a search-warrant. He testified he stood outside the door, put his nose down, and smelt the fumes of smoking opium. Thereupon he went and secured a search-warrant. So Judge Neterer sustained the petition to suppress the evidence on the grounds that you could not enter a dwelling-house upon that kind of an affidavit.

Mr. McCUTCHEON.—I would like to read these two paragraphs.

Mr. CHAVELLE.—Even tho they had a search-warrant. They entered here upon a suspicion. They were told that things were very peculiar around there, and they sent the agents right over, and they went in after several hours of search they seized some articles.

The COURT.—That was right here in this district. The Temperani case,—

Mr. CHAVELLE.—Yes it is a distillery. I can give it to you.



The COURT.—I think you will find it under the National Prohibition Act. [37]

Mr. CHAVELLE.—Oh, yes.

The COURT.—One of the main issues in that case also was a motion to suppress the evidence on the grounds that no receipt was given for the goods accepted.

Mr. CHAVELLE.—They don't say that in their decision your Honor.

The COURT.—There was some reference made to it. What was that other, Mr. McCutcheon?

Mr. McCUTCHEON.—I was speaking of the Volstead Act. (Reading.)

Mr. CHAVELLE.—By the weight of authority of law, the fact that liquor is being distilled is not sufficient evidence,—it must appear that the dwelling-house was used in part for the unlawful sale, used in part for some other business purpose. (Reading from McFadden on Prohibition, page 219.)

The COURT.—I think you will find there is a distinction lies there between the Internal Revenue Act and the Volstead, or National Prohibition Act. And also in some of those decisions, I am not entirely familiar with all the facts.

Mr. CHAVELLE.—(Reading.) A dwelling-house cannot be entered.

Mr. McCUTCHEON.—I understand a person living in a still, you couldn't claim it was a dwelling-house.

The COURT.—I think it has been the ruling of

Judge Cushman that when a distillery is kept at a dwelling [38] that changes it from the character of a dwelling to the character of a distillery. I always thought the Court was right, because otherwise I don't see how in the world you could ever distinguish a dwelling from a distillery. I don't see now how they can enforce those three sections.

Mr. CHAVELLE.—The Judge says it is up to Congress, and I think it is.

The COURT.—I think if they have proper cause to believe there is a violation of the law in a private dwelling, they can go in without a search-warrant.

Mr. CHAVELLE.—Do you think it issuable under the Internal Revenue Law? There is some argument there.

The COURT.—I know there is. At the same time the issuance of a search-warrant was almost unknown a hundred years ago. You couldn't get a search-warrant, but *not it* is an entirely different proposition.

Mr. CHAVELLE.—I don't know of a decision where they have been permitted to enter a private dwelling-house without a search-warrant. I have ben trying to think of some case. Of course if an offense was committed in their presence, if a door was opened,—

The COURT.—If it is a case where you can look thru a door and see a still,—

Mr. CHAVELLE.—That was the Mobile case I referred to awhile ago.

The COURT.—Judge Cushman says, why if they can smell it,—

Mr. CHAVELLE.—Our Court has twice sustained the [39] Temperani case. There was no sign of a sale.

The COURT.—I think you will find that under National Prohibition Act.

Mr. CHAVELLE.—I don't know of any decision to the contrary. He says the Courts have so held,—

The COURT.—I don't think under the circumstances,—have you any testimony at all?

Mr. CHAVELLE.—How about the bond.

The COURT.—I will leave it the same amount, and issue an order binding over both defendants. Will you have these defendants sign up these bonds and have them acknowledged? I wish the Supreme Court of the United States could come out and tell us just how far we can go in these cases.

Mr. CHAVELLE.—They won't do it. They just slip around it somehow.

(Thereupon hearing closed at 3:00 P. M., July 20, 1928.)

[Endorsed]: Filed Sep. 28, 1928. [40]

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[Title of Court and Cause.]

TRIAL.

Now on this 3d day of December, 1928, Tom DeWolfe, Assistant United States Attorney, appearing for the plaintiff, and E. H. Chavelle, appear-

ing as counsel for the defendants, this cause is called for trial at 2 P. M., the Government announcing that it is ready. Counsel for defendants states that for the purpose of being timely therein he desires to present a motion to suppress the evidence. The Court states that it will be disposed of upon the evidence adduced at the trial, and an exception is noted by the defendants' counsel. Awaiting return of the jurors excused to that hour this morning further proceedings are continued to 3 P. M., at which time both sides being ready, a jury is impanelled and sworn as follows: Frank J. Larebe, E. F. Myron, Walter White, J. O. Anderson, Henry G. Runkel, Fred Woodson, A. Mock, E. M. Taylor, Carl T. Ehlers, Harry C. Wilson, William Erb, H. J. Gould. Counsel for both sides make opening statements to the jury. Government witnesses are sworn and examined as follows: C. H. Griffith, Howard Carr, W. H. Kinnaird, Government exhibits numbered 1 to 9, inclusive, are admitted in evidence. Government rests. Counsel for defendants renews motion to suppress the evidence. Whereupon the Court rules the evidence competent and legally obtained and the said motion is denied. An exception is noted. Defendants move to strike the evidence of each and all of the Government's witnesses. The motion is denied and an exception is noted. Counsel for defendants moves for a directed verdict and the motion is denied. An exception is noted. Defendants' witnesses are sworn and examined as follows: J. Charles Stanley, Fred C. Campbell, Lester D. Un-

ger, Urban C. Huff, David Levine, Humbert Rossi, Anita Alvau. [41] Government exhibits numbered 10 and 11 are admitted in evidence. Exhibits numbered 12, 13, 14 are identified. Exhibits numbered 15 to 22, inclusive, are admitted in evidence. Defendants rest. Rebuttal witnesses are sworn and examined as follows: W. M. Kinnard, Howard Carr. J. Charles Stanley, recalled, for defendants by leave of Court. Both sides rest. Counsel for defendants renews motion for a directed verdict. The motion is denied and an exception is noted. Counsel for defendants renews motion to suppress evidence, which motion is denied and an exception noted. Counsel for defendants renews motion to strike all the evidence and said motion is denied. An exception is noted. Defendants offer in evidence the affidavits supporting the motion to suppress the evidence. The Government offering no objection, the motion is granted. The Government objecting thereto, a motion to admit in evidence the record of hearing before the United States Commissioner is denied and an exception is noted. The cause is argued to the jury. Whereupon the jury is admonished by the Court and the case is continued to 10 A. M. to-morrow.

Recorded in Journal No. 16, at page 481. [42]

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[Title of Court and Cause.]

TRIAL (RESUMED).

Now on this 4th day of December, 1928, all jurors

and parties being present, the trial of this cause is resumed pursuant to adjournment. The jury is instructed and after exceptions taken thereto by the defendants, the jury retires shortly after 10 A. M. to deliberate of a verdict. Later, upon request therefor directed to the Court in writing by the foreman, the Court directs the sending of defendants exhibits identified as 13, 14 and 15, to wit, insurance policies, to the jury. At 2 P. M. the jury returns into court with a verdict, which reads as follows, to wit:

“We, the jury in the above-entitled cause, find the defendant, Frank Alvau, is guilty as charged in Count I of the Indictment herein; and further find the defendant, Humbert Rossi, is guilty as charged in Count I of the Indictment herein; and further find the defendant, Frank Alvau, is guilty as charged in Count II of the Indictment herein, and further find the defendant, Humbert Rossi, is guilty as charged in Count II of the Indictment herein; and further find the defendant, Frank Alvau, is guilty as charged in Count III of the Indictment herein; and further find the defendant, Humbert Rossi, is guilty as charged in Count III of the Indictment herein.

H. J. GOULD,  
Foreman.”

The verdict is received read, acknowledged by the jury, and ordered filed. The jury is excused from the case. Sentences are passed at this time. On motion of defendants for stay of execution for

the purpose of filing a motion for a new trial, the defendants are granted twenty-four hours in which to file the motion for new trial and stay of execution is granted for that time.

Recorded in Journal No. 16, at page 485. [43]

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[Title of Court and Cause.]

### VERDICT.

We, the jury in the above-entitled cause, find the defendant Frank Alvau is guilty as charged in Count I of the indictment herein; and further find the defendant Humbert Rossi is guilty as charged in Count I of the indictment herein; and further find the defendant Frank Alvau is guilty as charged in Count II of the indictment herein; and further find the defendant Humbert Rossi is guilty as charged in Count II of the indictment herein; and further find the defendant Frank Alvau is guilty as charged in Count III of the indictment herein; and further find the defendant Humbert Rossi is guilty as charged in Count III of the indictment herein.

H. J. GOULD,  
Foreman.

[Endorsed]: Filed Dec. 4, 1928. [44]

United States District Court, Washington.

12620.

U. S.

vs.

BEACH.

12622.

U. S.

vs.

ALVA and ROSSI.

### OPINION.

Defendants were tried for violation of sections 3266, 3281, 3282, R. S., crimes of the grade of felonies. These are internal revenue statutes of many years standing, to control and tax manufacture of distilled spirits, and severally provide penalties for (1) using a still in a dwelling-house, (2) carrying on the business of a distiller without having given bond, and (3) fermenting mash in any premises other than an authorized distillery. Defendants Beach and Alva, but not Rossi, timely moved to suppress the evidence as illegally secured, and in economy of time and procedure in a court congested as are all federal courts, with more cases than can be speedily tried, the greater part of which are petty matters of police filched from the states (See Yellowstone Bank Case, 277 Fed. 71), and which ought to be tried in federal police courts, the motions were heard in trial of the cases, defendants to have the benefit if of merit.



The Court found that the evidence was legally secured and competent, defendants by juries were found guilty, sentenced, and move for new trials. In Beach's case the evidence is that he fermented mash, set up and operated a large still as charged, in a small house which he for the time at least was occupying as a dwelling.

In his absence prohibition agents arrived with a search-warrant, entered the premises, searched and found the contraband articles, arrested him returning, and this indictment followed. [45]

The basis for probable cause and the warrant was an agent's affidavit that in the premises three named persons and others unknown were in possession of a still, distilling apparatus and materials designed to make, and therein are selling, intoxicating liquor; that therefrom emanated the odor of fermenting mash; that he had seen materials for manufacture taken in containers usual for intoxicating liquor carried out, and heard one of said persons state that intoxicating liquor was for sale therein; and that said premises were used for manufacture of intoxicating liquor as well as for dwelling.

In *Alva and Rossi's Case*, the evidence is that the prohibition agents being informed the former's actions upon his ranch were "suspicious," proceeded to investigate. Arriving at the premises the agents were at once sensible of the usual strong, penetrating and unmistakable odors of a distillery in operation, viz., fermenting mash and a still operating and by kerosene burners.

These they traced to the dwelling-house of Alvo. Their hails unanswered they forced the basement door, and proceeded to search. For a time baffled, at length they found a hidden door from the basement into another basement otherwise inaccessible and concealed, wherein was a 200-gallon still in operation, 1,000 gallons of fermenting mash, and the other usual appliances to a complete large scale distillery. Alvo and his family were occupants of the house, and Rossi was found in the still-room and evidently operating the plant.

Much of the comment of the writer in *Cala's Case*, 17 Fed. (2) 829, reversed, 22 Fed. (2) 742, *Herter's Case*, 24 Fed. (2) 111, reversed, 27 Fed. (2) 521, applies to the instant cases and is incorporated by reference.

The distinction between the cases is clear and vital, viz., those were prosecutions for violations of the Volstead Act, misdemeanors; these, for violations of the Internal Revenue laws, felonies. These latter amongst other things provide that every [46] person who makes mash or "produces distilled spirits . . . shall be regarded as a distiller" (§ 241, Title 26, U. S. C.), that taxes shall be levied and collected (§ 245, 2d.), that no still shall be used in a dwelling-house (§ 291 2d.), that it is "lawful for revenue officers at all times to enter into any distillery or building or place used for the business of distilling. . . to examine, gauge, measure, and take account of every still . . . and of the mash and spirits which may be in any such distillery or premises," and refused

admission, it is lawful for the officer to break and enter (§ 299, 2d).

These statutes are existing law, and the prohibition agents being vested with all the power by them created (§ 45, Title 27 U. S. C.), and the premises being used for the "business of distillation," the entries by the officers made were lawful.

Moreover, in Beach's case the search-warrant was based upon an affidavit disclosing probable cause. And in Alvo's case, the agents had knowledge of a crime being committed, which on settled principles authorized entry to interrupt and to arrest the offenders. The motions for new trials are denied!

Dec. 10, 1928.

BOURQUIN, J.

[Endorsed]: Filed Dec. 10, 1928. [47]

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[Title of Court and Cause.]

ANSWERING AFFIDAVIT OF FRED C.  
CAMPBELL.

United States of America,  
Western District of Washington,  
Northern Division,—ss.

Fred C. Campbell, being first duly sworn, on his oath deposes and says that he is a citizen of the United States, and a resident of the city of Seattle, King County, Washington, practicing law in said city and State; that his law offices are located in the Republic Building of said City; that on the 30th

day of October, 1928, this affiant went to the home of Frank Alvau, located at Redondo Beach, King County, Washington, for the purpose of making a thorough examination of said premises, and to ascertain where the alleged still purported to have been found by the Federal Agents in this cause was located; that he thoroughly examined said residence and discovered the following facts:

That said residence is an ordinary dwelling-house, located on an elevation considerably higher than the county road which runs past the same, at a distance of about one thousand feet or more from said dwelling; that there is large garden in which vegetables and crops for the support of the family are raised; also a chicken-yard in which chickens and a cow are kept for the use of the family, and a well and substantially built residence with a heavy cement foundation, completely under the said house; that affiant was shown the place where the alleged still was found by federal agents, and that portions of said alleged still were in said place, to wit, what was at one time supposed to be the [48] brick foundation for the said still. That this affiant made a careful and minute examination of the foundation of said premises and denies that there is any room constructed or could have been constructed without coming under the observation of this affiant which was directly under the residence of said house and in said basement, and that the allegations in the affidavit of Howard E. Carr on file in this cause "that the still-room was not even under the rest of the house, but was excavated on the outside of the

foundation limits" is absolutely false and untrue, but that said room where said alleged still was alleged to have been in operation is directly under the kitchen of said residence and clearly within the inside limits of the original foundation of said house; that the basement hertofore referred to is a part of the dwelling-house of the said Frank Alvau and is used for the purpose of storing food, laundry and for such other and ordinary purposes as basements are used for in such dwelling-houses; that this affiant examined the lock on the inside of said basement door and noted that the woodwork on said door had been broken off by some heavy force from the outside; that there is an entrance from said basement to the kitchen of said residence by means of a stairway at the top of which is the ordinary house door. That this affiant specifically denies that there is any foundation that is not under the rest of the house, and alleges the fact to be that no such condition exists. This affiant further states that he has no interest in this case either as an attorney or otherwise, but makes this affidavit for the sole purpose of getting the true facts before this honorable Court.

Further affiant saith not.

FRED C. CAMPBELL.

Subscribed and sworn to before me this 2d of November, 1928.

M. H. CUSHING,  
Notary Public in and for the State of Washington,  
Residing at Seattle. [49]

Received a copy of the within affidavit this 2d day of Nov., 1928.

ANTHONY SAVAGE,  
Attorney for Ptf.

[Endorsed]: Filed Nov. 2, 1928. [50]

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[Title of Court and Cause.]

ANSWERING AFFIDAVIT OF GINO ALVAU.

United States of America,  
Western District of Washington,  
Northern Division,—ss.

Gino Alvau, being first duly sworn, upon his oath deposes and says that *he eleven* years of age and in the sixth grade at the Steel Lake School, King County, Washington. That on or about the 12th day of July, 1928, this affiant states that he was sleeping on the second floor of the said dwelling-house, and occupied a bedroom alone, and did at all times hereinafter mentioned. That he was awakened by the sound of footsteps upon the stairs and immediately thereafter a man came into the room. That the condition of the night was such that he could not distinguish the man's face in the darkness; that he overheard the following conversation, and that his father, Frank Alvau, one of the defendants herein, said: "Where are your papers?" That thereupon the man said in answer to his father, "I don't need any papers." That his father said to the man, "Where is your star?" That the man,

who later was identified as a prohibition agent, searched his room, and his father's room. That later on, about fifteen minutes after he had searched the house, he went out to the porch upstairs, and called, "Hey, Charlie," and someone answered "All right," and then two men came upstairs and again searched the dwelling-house, and they went [51] from the bedroom of the said defendant, Frank Alvau, to the unfinished portion of said dwelling known as an attic of said dwelling-house. That after making the said search of said bedrooms and attic they went downstairs again.

Further affiant saith not.

GINO ALVAU.

Subscribed and sworn to before me this 29th day of October, 1928.

M. H. CUSHING,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

Received a copy of the within affidavit this 2 day of Nov., 1928.

ANTHONY SAVAGE,  
Attorney for P'tff.

[Endorsed]: Filed Nov. 2, 1928. [52]

[Title of Court and Cause.]

ANSWERING AFFIDAVIT OF ANNETTA  
ALVAU.

United States of America,  
Western District of Washington,  
Northern Division,—ss.

Annetta Alvau, being first duly sworn, upon oath deposes and says, that she is the daughter of the defendant, Frank Alvau, and that at all of the times hereinafter mentioned lived at the premises constituting and comprising the family dwelling-house, the residence of the said defendant. That she is of the age of nine years, and is in the fourth grade in the Steele Lake School; that on or about the 12th day of July, 1928, this affiant was sleeping with her mother in the said dwelling-house and residence referred to, when she was awakened by the noise and motions incident to the prowling about the house by the prohibition agents; that she looked out of the window of said premises from her bedroom and saw in the darkness the figure of what appeared to her to be a woman; that thereafter she heard the crashing and breaking into of said dwelling-house and thereupon some strange man entered her bedroom (who subsequently was identified as connected with the Prohibition Department of the Federal Government). That between the period of time that she heard the crashing and breaking into of said premises and the appearance of said man, was about the time that would have



been sufficient to have broken into the house and entered said bedroom. That the bedroom in question hereinafter referred to is on the first floor [53] of said dwelling-house and that the aforesaid agent stated in the presence of said affiant as follows, "Pardon me, I have made a mistake." The condition of the night was very dark.

Further affiant saith not.

ANTONIETTA ALVAU.

Subscribed and sworn to before me this 29th day of October, 1928.

[Seal]

M. H. CUSHING,

Notary Public in and for the State of Washington,  
Residing at Seattle.

Received a copy of the within affidavit, this 2 day of Nov. 1928.

ANTHONY SAVAGE,

Attorney for Ptff.

[Endorsed]: Filed Nov. 2, 1928. [54]

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[Title of Court and Cause.]

ANSWERING AFFIDAVIT OF MARY ALVAU.

United States of America,  
Western District of Washington,  
Northern Division,—ss.

Mary Alvau, being first duly sworn, upon her oath deposes and says that she is the wife of Frank Alvau and mother of Annetta and Gino Alvau and lives with her husband and children in a frame

dwelling-house at Redondo, King County, Washington. That the said dwelling-house consists of four rooms, upon the main or first floor being the kitchen, dining-room, living-room and a downstairs bedroom. That the said house being plastered and completely furnished as a dwelling-house and occupied by the said defendant Frank Alvau and his family, consisting of a boy and girl, ages eleven and nine respectively. Also a full cement basement, the entrance of which leads by a stairway into the kitchen. That on the second floor there are two bedrooms furnished, plastered and occupied by the son of this affiant and her husband, together with an unfinished portion of said dwelling-house, used as an attic. That there is a porch on the front of the said house adjoining the downstairs porch thereof. That the said dwelling-house is situated on a large tract of land about one thousand feet from the entrance of the gate to said premises, sitting on a point that is a considerable elevation above the level of the road to said entrance. That surrounding the house are flower gardens, a well, and a water system and beyond the said flower gardens are large vegetable gardens which are cultivated and crop bearing in season; that said vegetables [55] raised from the land are used for the sustenance of the family and at the rear of said house are chicken-yards, produce and chicken eggs being used for the table of the family. That in the pasture adjoining the said house is a cow, kept by the said family for the milk that is used in making cheese for the market and for the use of the family. That they have occupied

the said dwelling for three years immediately prior to the 12th day of July, 1928. Said dwelling-house having been built as such by affiant's husband and so occupied ever since its completion. That on the day in question, namely, the 12th day of July, 1928, affiant was awakened in the night-time, about the hour of three A. M., by the barking of a dog. That her little daughter, who was awake at the time, and next to the window, told affiant that a woman was outside of the house. That her husband said to her, "Don't be scared," believing as he told her that there was someone trying to break into the house, thinking that it was a prowler intent on stealing. That her husband did not leave the premises or go outside the said dwelling-house, but was at all times herein mentioned in said house. That thereupon the affiant heard the breaking in of the basement door, and the entry of a man into her room, who proceeded to search the room. After searching around, the man (who was later identified as a prohibition agent) said, "Pardon me, I have made a mistake." Then he ran upstairs where affiant's husband was at all times herein mentioned and where her son slept. That her husband spoke and said, "Who is it?" That thereafter affiant did not hear any further part of that conversation. That thereupon this affiant got up from her bed. The night was still dark, and affiant turned on the electric lights so that she could see, and made a fire in the kitchen range. That thereafter this affiant went to the chicken-yard in the rear of the said premises to feed the chickens and three or four

men went to the chicken-yard [56] of said premises apparently looking for something that they could not find. One man remained in the house and searched about the house, the house having been previously searched by them, and the search continued. About fifteen minutes after, while this affiant proceeded with her housework, one of the men came into the house, still searching about, making a complete search about the premises. It was still dark and the lights were burning to give affiant light to see about her work. That then again, two of the men went upstairs and affiant followed them to see what they were going to do, and they searched about, going even into the clothing of this affiant which they threw around, and took from the closet a revolver. That in running around the house one of the men, by reason of the condition of the weather (as it was raining), asked if he could go into the basement where there was a stove to dry his clothes, and this affiant told him he didn't need to go into the basement, but could come into the kitchen where she had a good fire burning. Affiant helped him to dry his clothes and gave him a hot cup of coffee to help warm him up. That the search continued by the four men until about seven o'clock and then all of the men left and went away except one. That the man who returned, dried his clothing for awhile and proceeded to search the house again, then back to the stove, and would look around in the house searching for something. That between seven and eight o'clock, affiant's husband was permitted to leave the premises and was away until about eleven

o'clock, being away about four hours. That one of the agents being a real stout man, said to the boy of the affiant, "Did you see a still," and the boy inquired, "What is a still, do you mean a robbery?" Then affiant took her little boy into the house. That affiant has read the affidavit of Howard Carr. That said agents were on the premises as hereinbefore related continuously from about three A. M. of said day [57] until nine o'clock, when they claimed to have discovered a still after the persistent search of said dwelling-house, namely, of about six hours. That after all of the agents who were then there had eaten their lunch, they left the same after two o'clock, some of them being there from three A. M. of said morning. That the statement of Howard Carr that the still was not even under the rest of the house, but was excavated in the ground outside of the foundation limits of the house is false and untrue. Affiant states the facts to be that the said part of the house just referred to is a part of the original foundation of said dwelling-house, and directly under the kitchen of said house, and that the walls are a continuous part of the said original foundation upon which said house was built and now rests and that there is no excavation in the grounds outside of the foundation limits of the house, but that all of the said premises are strictly within the limits of the foundation of said house. That affiant further states that the entrance of said basement is the ordinary entrance that one would expect to find in a dwelling of this character, being a door leading from the basement to the outside and there

is nothing unusual about the entrance of said premises but that said door is an ordinary basement door, affording access to the premises from the outside or to the outside from the said inside of the house, and leading from the basement to the lower floor of said premises. That further the said statement of the said Carr that no entrance into the living quarters of Alvau was made until after said still was seized and defendant arrested for a crime committed in the agent's presence is false and untrue and that the facts are as heretofore alleged that agents searched said house at least six hours before finding the alleged still. That affiant further states that she is the wife of the said defendant, [58] Frank Alvau, and the person referred to in the affidavit of said Carr, and that she did not state in the presence of Frank Alvau and of Frank Carr, or anyone else, that there was a still on the place and that the agents would be unable to find it. That she had no conversation with said officers except as hereinbefore related, which is the substance or whole of her conversation with him during all of the time of their presence on the premises. That the said Frank Alvau was permitted by said officers to leave said premises early in the morning and to remain away from the same having come to Seattle (having afterwards returned) for a period of more than four hours, and that no conversation, as stated by the said Carr in the said affidavit, ever took place, and affiant denies the whole of said allegation pertaining to any of such conversation. Affiant further specifically denies that said de-

fendant Frank Alvau attempted to drive the agents from the vicinity with a gun, or that he ever came out of the premises, or left the dwelling-house on the morning in question except as hereinbefore stated, and that he was in the premises at all times as the agents searched until they gave him permission to leave for Seattle.

Further affiant saith not.

MARY ALVAU.

Subscribed and sworn to before me this 29th day of October, 1928.

M. H. CUSHING,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

Received a copy of the within affidavit this 2 day of Nov., 1928.

ANTHONY SAVAGE,  
Attorney for Ptff.

[Endorsed]: Filed Nov. 2, 1928. [59]

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[Title of Court and Cause.]

ANSWERING AFFIDAVIT OF FRANK ALVAU.

United States of America,  
Western District of Washington,  
Northern Division,—ss.

Frank Alvau, being first duly sworn, upon his oath deposes and says: That he is one of the de-

fendants in the above action, that the premises described in this case were used by said defendant and his family as a dwelling-house and the land on said premises was used to raise vegetables and crops for the support of the said family, and also the chicken-yard and meadow where are kept chickens and a cow which are used for the same purpose, in the description of the premises as set forth in the affidavit of Mary Alvau, wife of defendant, and which affidavit is heretofore accepted and referred and made a part of this affidavit as far as the description of said premises and ground. That Frank Alvau has read the affidavit of the said Howard Carr, submitted in evidence in a motion to suppress in this cause, and denies that there was any pool of refuse mash found on the premises as hereinbefore described of this affiant other than the alleged mash found by said agent in the basement of said premises, after the breaking in by said agent of affiant's residence; that the statement of the agent that said defendant, Frank Alvau, came out of said premises and attempted to drive out the said agents at the point of a gun is false and untrue; that affiant at no time left the premises until he was permitted by the agents to go to Seattle, from whence he returned, having consumed about four hours on said trip; that said [60] affiant denies the statement of said Carr that his wife stated in his presence and in the presence of said Carr that there was a still on said premises, and that agents would be unable to find it, that he did not repudiate such a statement, as there never was



a statement of this kind or character that he could repudiate, and that there are no concrete walls other than the foundation for said house and that the said dwelling-house completely occupies and rests upon the walls of said foundation and there is no part of said foundation that said house does not rest upon. Affiant specifically denies that there is any wall or foundation that is not even under the rest of the house, but was excavated under the foundation limits of the house, as being false and untrue, and that no such condition exists. Affiant further states that the basement door referred to in the affidavit of said Carr is an ordinary basement door as can be expected to be found in any dwelling-house, and the forced ingress and egress into the same constituted a basement and from the basement by the usual stairway to the first floor.

That affiant further states that on or about the 12th day of July, 1928, he heard the dog barking and thereafter some noises about his house, and thereupon discovered what he believed to be a prowler peeping into the bedroom windows of said dwelling-house. That he attempted to allay the fear of his wife and minor daughter; that he thereafter heard the breaking of the basement door by the entry into the house of said prowlers and that thereupon a man entered his bedroom, and the conversation that took place was as follows: Affiant said, "Who you are?" the answer was, "Federal's." Affiant said, "Where your papers?" and the answer was, "Don't need any papers"; then affiant asked, "Where is your star?" Thereupon the man

showed his star, and proceeded to search the bedroom of affiant, and it was about three A. M. o'clock and it was very dark. He searched the bedroom of affiant and then searched the bedroom of affiant's son, which was separated from affiant's bedroom, and [61] then the attic, which was the unfinished part of the upstairs; then he went out upon the upstairs porch; that thereafter, after searching all of the upstairs of the said dwelling-house, and all of the rooms therein, the man went to the basement. There were at least three in the basement of said dwelling-house. That one of the agents said there was no still here, and "What we smell is cheese." The basement being full of cheese being made from the milk of the cow. That they then came upstairs again and searched all around and one of the agents said, "We have not started yet to look," and they proceeded to look over all the rooms and parts of the said dwelling-house. They then went down to a point where affiant has his cesspool about seventy feet from the house and asked affiant for a crowbar, and affiant said he had no crowbar, and they then asked for a shovel and they went down and dug at a point where the cesspool was located. They seemed to be very much disgusted at apparently not finding what they were looking for. Then one of the agents said, "You hold this dog," meaning the dog belonging to affiant and family, "Or if you don't I am going to shoot him," and affiant said there was no need of killing the dog, and then he went and looked in the house where the chickens of affiant were kept; and

then he searched all the premises with the other agents. That the agents would alternate between the search of the premises outside, and then would come inside and search inside of the house and then would go outside of the house and search about and return again into the said house and kept this up on said premises until about seven o'clock, a period of approximately four hours, when two or three of the men left the place and went away, leaving one man behind on the premises. That the said one agent was drying his clothes by the fire and the wife of this affiant gave him a hot cup of coffee. Affiant explained to this agent that he had an appointment in Seattle that he had to keep and the agent told him to go to Seattle and keep his [62] engagement and attend to his business, which kept him three or four hours, and returned to the said premises. That two of the men stayed for lunch and had their dinner with the affiant and his family, and then another of the agents said he was hungry and wanted to know if he could have something to eat, and then affiant fed him, being Agent Kinnair.

Further affiant saith not.

FRANK ALVAU.

Subscribed and sworn to before me this 29th day of October, 1927.

[Seal]

M. H. CUSHING,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

Received a copy of the within affidavit this 2 day of Nov., 1928.

ANTHONY SAVAGE,  
Attorney for Ptff.

[Endorsed]: Filed Nov. 2, 1928. [63]

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[Title of Court and Cause.]

ANSWERING AFFIDAVIT OF HUMBERT  
ROSSI.

United States of America,  
Western District of Washington,  
Northern Division,—ss.

Humbert Rossi, one of the defendants named herein, being first duly sworn, upon his oath deposes and says: That on or about the 12th day of July, 1928, he was present at the premises of Frank Alvau, at his dwelling-house at Redondo, King County, Washington. That the said dwelling-house is the same dwelling-house described in the affidavit of Mary Alvau, which is referred to and made a part herein; that said affiant has read the affidavit of Howard Carr, in resistance of a motion to suppress in this cause, and that the said affidavit of said Carr is false and untrue and that the said Carr says there is a foundation and excavation outside of the premises of said dwelling-house. That there is no such foundation,—in fact that the only foundation is the foundation on which the house solely rests, and that there are no outer

walls or excavation adjoining the said premises. That the said, Humbert Rossi, affiant herein heard and saw someone prowling around said house and thereafter a crashing and breaking of the basement door of said dwelling and the entry into of said house by some prowlers, at about the hour of three A. M. o'clock on said 12th day of July, 1928. That the night was dark and cloudy and rainy. That the said premises were used by the said Frank Alvau and family, consisting of a son and daughter and wife, together with the ground adjoining thereto, solely as a dwelling-house. [64] That thereafter affiant examined said door of said house, and that said door showed that the sill of door had been broken by a forceful entry thereof. That there is nothing about the entry of said basement that is different from the entrance of said door to any other dwelling-house of a similar kind and character. That the said agents were in said premises for a period of about six hours searching the same.

Further affiant saith not.

HUMBERT ROSSI.

Subscribed and sworn to before me this 29th day of October, 1928.

[Seal]

M. H. CUSHING,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

Received a copy of the within affidavit this 2 day of Nov., 1928.

ANTHONY SAVAGE,  
Attorney for Ptff.

[Endorsed]: Filed Nov. 2, 1928. [65]

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[Title of Court and Cause.]

AFFIDAVIT OF J. CHARLES STANLEY.

United States of America,  
Western District of Washington,  
Northern Division,—ss.

J. Charles Stanley, being first duly sworn, on oath deposes and says: That I am an architect, duly licensed and practicing, and a graduate of the School of Architecture of the University of Pennsylvania, in 1906; that I have maintained an office in the city of Seattle for many years, and now maintain an office in the Republic Building on Pike Street, in Seattle, King County, Washington; that in 1907-1908 I was assistant designer for the architectural firm of Geo. B. Post & Sons, New York, who were the architects for the Olympic Hotel at Seattle, and while in their employ I worked on the City College of New York, Wisconsin State Capitol, Cleveland Trust Co. Building, at Cleveland, and several other buildings. In 1909-11, I had charge of the office of Saunders & Lawton, architects at Seattle, and while in their employ designed the State Reformatory Building at Monroe, the For-

estry Building at the Exposition on the University of Washington grounds, the Alhambra Theater, now Livingston Bros., Crane Co. Building, and several other public buildings. In 1912-13, I was in the contracting and engineering business with A. W. Quist Construction Co., and built the Times Building. In 1915-16 I designed the Ames Ship Yard and several other shipyards on [66] the Coast; in 1919-22, designed the Elks Club building in Olympia, Washington, and also in Centralia, Washington; built school buildings at Olympia. Since 1922 I have been in practice in Seattle, and have designed the Elks Club at Port Angeles and other buildings there; the Greenwood Block at 85th and Greenwood in Seattle, and other store buildings and residences in the city of Seattle.

That at the request of the attorneys for the defendants in the above-entitled cause, I examined the premises at or near Redondo Beach, in King County, Washington, comprised and consisting of a dwelling-house; that the said building is a new frame structure, and there are no exterior walls upon the said premises upon which the building does not rest; that the dwelling-house consists entirely of a single structure, and the part of the premises in which it is alleged there was a still is within the confines of the said dwelling-house, and a part of the foundation upon which the dwelling-house rests; that immediately above said particular part of the premises just referred to, and in which it is alleged there was a still, is the kitchen and a bathroom of the said dwelling-house.

That I have read the affidavit of Charles H. Griffith, regarding said structure, and made my examination for the purpose of ascertaining the truth or falsity of said affidavit; that the said house in question is located on a mound, but there is no tunnel from the outside, into the basement on a water level, or otherwise; that the cement walls of the basement, in what is referred to in the affidavit of said Griffith, are distillery rooms, are not of recent cement and construction, but are the original foundation walls of the said structure; that the main part of the basement and foundation follows the outline of the house, but the same is not rectangular, and what is referred to as distillery rooms, are not built off to the side of the main structure, as it is all a [67] main part of the house, and there are no foundations built off to one side of any structure that are not the walls of the main part of the house; that the rooms referred to as the distillery rooms, which the said affidavit states are not under the kitchen, are under the kitchen of said house, and that there is no old outside lean-to, to said porch or said premises, which is used for the purpose of storing household utensils, vegetables and other uses, but that the said part of the house is the kitchen, and there is no old lean-to whatsoever upon said premises.

That attached hereto, specifically referred to and by reference made a part of this affidavit, is a correct sketch made by me of the entire structure upon which the said dwelling-house rests, containing all of the premises in question.



Referring again to the affidavit of said Griffith, that the still-room was without and beyond the main foundations of the said house, and that only the back porch of the house and no other part of the house was over the room referred to as the still-room, is false and untrue; that the part of the premises comprising the said room referred to as a still-room is a part of the main foundations of the structure, and that over said part are the kitchen and bathroom of the said dwelling-house.

And further affiant saith not.

J. CHARLES STANLEY.

Subscribed and sworn to before me this 27th day of November, 1928.

[Seal]                      EDWARD H. CHAVELLE,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

[Endorsed]: Filed Dec. 3, 1928. [68]

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[Title of Court and Cause.]

### MOTION IN ARREST OF JUDGMENT.

Come now the defendants, and move the Court to arrest judgment and sentence herein, upon the ground and for the reason, among others:

1. That the evidence introduced at the trial was insufficient to sustain the verdict rendered herein.

Dated at Seattle, this 5th day of December, 1928.

EDWARD H. CHAVELLE,

JOHN B. WRIGHT,

Attorneys for Defendants.

315 Lyon Building, Seattle, Washington.

Received a copy of the within motion in arrest of  
judgt. this 5th day of Dec., 1928.

ANTHONY SAVAGE,

Attorney for \_\_\_\_\_.

[Endorsed]: Filed Dec. 5, 1928. [69]

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[Title of Court and Cause.]

#### MOTION FOR NEW TRIAL.

Come now the defendants, and move the Court to set aside the verdict of the jury heretofore entered herein, and grant a new trial, on the following grounds:

1. Error in law committed by the trial Court in instructing the jury.

2. That the verdict was against and contrary to law.

3. That said verdict was against and contrary to the evidence.

4. Error in law committed by the trial court in refusing to grant the petition of the defendants to suppress the evidence.

5. Insufficiency of the evidence to justify the verdict.

6. Errors of law occurring during the trial, and excepted to by the said defendants.

Dated this 4th day of December, 1928.

EDWARD H. CHAVELLE,

JOHN B. WRIGHT,

Attorneys for Defendants.

315 Lyon Building, Seattle, Washington.

Received a copy of the within motion for new trial this 5 day of Dec., 1928.

ANTHONY SAVAGE,

Attorney for \_\_\_\_\_.

[Endorsed]: Filed Dec. 5, 1928. [70]

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[Title of Court and Cause.]

SENTENCE (FRANK ALVAU).

Comes now on this 4th day of December, 1928, the said defendant, Frank Alvau, into open court for sentence, and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, and he nothing says, save as he before hath said.

WHEREFORE, by reason of the law and the premises, it is CONSIDERED, ORDERED AND ADJUDGED by the Court that the defendant is guilty of knowingly, willfully, unlawfully and feloniously making and fermenting certain intoxicating liquor as charged in Count I of the Indictment; of

knowingly, willfully, unlawfully and feloniously using a certain still for the purpose of distilling spirits as charged in Count 2 of the Indictment; of knowingly, willfully, unlawfully and feloniously carrying on a business of a distiller of spirits as charged in Count 3 of the Indictment, all in violation of Sections 3266, 3281 and 3282, Revised Statutes, and that he be punished by being imprisoned in the Jefferson County Jail or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States, for the period of eight (8) months on each count, said term of imprisonment to run concurrently and not consecutively, and to pay a fine of \$1,000.00. And the defendant is hereby remanded into the custody of the United States Marshal to carry this sentence into execution.

On motion of counsel for defendants for stay of execution for the purpose of filing a motion for a new trial the defendants are granted twenty-four hours in which to file a motion for new trial and stay of execution is granted for that time.

Recorded in Judgments and Decrees No. 6, at page 77. [71]

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[Title of Court and Cause.]

SENTENCE (HUMBERT ROSSI).

Comes now on this 4th day of December, 1928, the said defendant, Humbert Rossi, into open court

for sentence, and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, and he nothing says, save as he before hath said.

WHEREFORE, by reason of the law and the premises, it is CONSIDERED, ORDERED AND ADJUDGED by the Court that the defendant is guilty of knowingly, willfully, unlawfully and feloniously making and fermenting certain intoxicating liquor as charged in Count I of the Indictment; of knowingly, willfully, unlawfully and feloniously using a certain still for the purpose of distilling spirits; of knowingly, willfully, unlawfully and feloniously carrying on a business of a distiller of spirits, as charged in Count 3 of the Indictment, in violation of Sections 3266, 3281 and 3282, Revised Statutes, and that he be punished by being imprisoned in the Jefferson County Jail or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States for the period of eight (8) months on each count, said term of imprisonment to run concurrently and not consecutively, and to pay a fine of \$1,000.00; and the defendant is hereby remanded into the custody of the United States Marshal to carry this sentence into execution.

On motion of counsel for defendants for stay of execution for the purpose of filing a motion for a new trial, the defendant is granted twenty-four

hours in which to file a motion for a new trial and stay of execution is granted for that time.

Recorded in Judgment and Decrees No. 6, at page 77. [72]

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[Title of Court and Cause.]

### NOTICE OF APPEAL.

To the UNITED STATES OF AMERICA, Plaintiff, and to ANTHONY SAVAGE, United States District Attorney, Attorney for Plaintiff:

PLEASE TAKE NOTICE, that the above-named defendants, Frank Alvau and Humbert Rossi, through their attorneys, Edward H. Chavelle and John B. Wright, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the verdict rendered in the above-entitled action, and from the judgment and sentence thereon, and from each and every order and ruling made during the trial of said action, adverse to these defendants.

Dated this 12th day of December, 1928.

EDWARD H. CHAVELLE,  
JOHN B. WRIGHT,

Attorneys for Defendants.

315 Lyon Building, Seattle, Washington.

Received a copy of the within notice of appeal this 12th day of Dec., 1928.

ANTHONY SAVAGE,  
Attorney for \_\_\_\_\_.

[Endorsed]: Filed Dec. 12, 1928. [73]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable GEORGE M. BOURQUIN,  
Judge of the District Court Aforesaid:

Come now the defendants, Frank Alvau and Humbert Rossi, by their attorneys, and respectfully show:

I.

That on the 4th day of December, 1928, the duly impanelled jury in the above-entitled cause, found a verdict of guilty against these defendants, upon the indictment herein; that thereafter, judgment was pronounced and entered in said cause against these defendants, wherein and whereby it was adjudged that the defendant Frank Alvau be imprisoned in the County Jail of Jefferson County, Washington, for a period of 8 months and pay a fine of \$1,000.00, and the defendant Humbert Rossi be imprisoned in the Jefferson County Jail for a period of 8 months, and pay a fine of \$1,000.00.

II.

That on said judgment and the proceedings had prior thereto, in this cause, certain errors were committed to the prejudice of these defendants, all of which are more in detail set forth in the assignments of error, which is filed herewith.

III.

Your petitioners, said defendants, feeling themselves aggrieved by said verdict and judgment en-

tered thereon as aforesaid, [74] hereby petition this Honorable Court for an order allowing them to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of said court in such cases made and provided, your petitioners having submitted and filed their bonds on appeal as provided by statute, and as heretofore fixed by the Court herein.

WHEREFORE, your petitioners, the defendants, pray an order allowing appeal in their behalf to said United States Circuit Court of Appeals aforesaid, sitting at San Francisco, in said Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in said cause, be duly authenticated, and that further proceedings be stayed until the determination of such appeal by the said Circuit Court of Appeals.

EDWARD H. CHAVELLE,  
JOHN B. WRIGHT,

Attorneys for Defendants.

315 Lyon Building, Seattle, Washington.

Received a copy of the within petition for appeal this 12th day of Dec., 1928.

ANTHONY SAVAGE,  
Attorney for \_\_\_\_\_.

[Endorsed]: Filed Dec. 12, 1928. [75]



[Title of Court and Cause.]

### ASSIGNMENTS OF ERROR.

Come now the defendants, Frank Alvau and Humbert Rossi, by Edward H. Chavelle and John B. Wright, their attorneys, and in connection with their petition herein, they severally assign the following errors which they aver occurred on the trial of said cause, which were duly excepted to by them, and upon which they severally rely to reverse the judgments entered against them herein.

The District Court erred as follows:

1. In denying the defendants' petition to suppress the evidence, which motions were separately and severally made for each of said defendants before the case was called for trial, and which motions were renewed and denied after the Government had rested its case, and which motions were renewed and again denied before the defense rested its case, and at the end of the entire case before the Court instructed the jury, for the reason that the dwelling-house of the defendants was entered and searched, and the seizure made of the articles, without a search-warrant, in violation of the constitutional rights of the said defendants, and that said search and seizure were illegal and unlawful.

2. In denying the defendants' motion to strike the testimony, which motions were separately and severally made for each of said defendants, after the Government had rested its case on direct, and again at the end of the entire case, for the reason

and upon the [76] ground that the said evidence was incompetent, irrelevant and immaterial, and based upon an illegal and unlawful search and seizure of the property of the defendants, and an invasion of the constitutional rights of the said defendants, in that their dwelling-house was searched in the night-time, without a search-warrant therefor, and that the evidence was illegally and unlawfully seized by reason of said unlawful search, and that all of the testimony was procured by reason of said unlawful and illegal search and seizure.

3. In denying the defendants' motions for a directed verdict, which motions were separately and severally made for each of said defendants at the close of the Government's case, and again at the close of the entire case, for the reason and upon the ground that sufficient evidence had not been produced to constitute a crime, and that there was no evidence except that procured by the unlawful search and seizure without a search-warrant, of a dwelling-house, and property had been seized in violation of the constitutional rights of the said defendants.

4. In denying the motion for a directed verdict made at the close of the Government's case, and again at the end of the entire case for the defendant Humbert Rossi, for the reason and upon the ground that the said Humbert Rossi was not required to file the bond or pay the tax as charged in Counts 2 and 3 of said Indictment, for the reason that all of the evidence only tended to show that said Rossi was an aider and abettor and the principal only

could be liable for the said tax and the said bond as charged in said counts.

5. In admitting the exhibits of the Government, consisting of parts of a still and also two specimens of intoxicating liquor, for the reason and upon the ground that the same were illegally and unlawfully seized in a search of a dwelling-house in the night-time, in violation of the constitutional rights of the said defendants. [77]

6. The Court erred in instructing the jury as follows:

“As to the evidence in this case, as the Court has stated to you it is its duty to pass upon the competency and admissibility of the evidence, and when it has done so and allows it to go in evidence, all question in respect to that are in the case and you accept the evidence and consider it. The officers go out to this place occupied by the defendant Alvau and his family, a little farm, house and barn, as they had a right to do. They had a right to do it for several reasons: First, that it is a violation of the revenue laws, and these same revenue laws provide that the officers of the Government have a right to enter a distillery at any time and discover who is operating it, gauge the liquors, and to assess and collect the taxes, and to destroy contraband utensils and production. So they entered properly, as the Court says, they find Alvau upstairs; after a long search they discover this distillery. You can see the length to which the law-breaker goes to

foil the efforts of the Government to maintain the laws and to punish the criminal. It took them several hours to find the secret opening into this distillery, in the basement.”

in that the Court instructed the jury to the effect that Government agents had a right to enter a dwelling-house at any time, to search for a distillery, without a search-warrant, to which the defendants and each of them separately and severally excepted, as being contrary to law, and in this case in violation of the constitutional rights of said defendants.

7. The Court erred in instructing the jury as follows:

“The credibility of the witnesses is for you. That applies as well to the defendants, when they testify, as to any other [78] witness. You see them, you observe their demeanor, take note of the reasonableness or of the unreasonableness of their statements to you. Are they attempting simply to deceive you by unreasonable statements? Are they counting upon a lack of intelligence in the jury-box to persuade you to believe any sort of a puerile and silly story? Remember, you are not obliged to believe a thing is so simply because some witness swears it is so. A witness can swear to anything, but whether it is to be believed or not is a matter for your judgment. As my predecessor in Montana, Judge Knowles, used to say, you are not obliged to believe anything solely because it is sworn to. A witness may take

the witness-stand and swear strongly that down the street he saw an elephant climb a telegraph pole, but you are not obliged to believe it, even if he takes you down and shows you the pole. I tell you, Gentlemen of the Jury, I have heard them just about swear to that in court, and so have you. Your judgment will determine where to place credibility and not allow yourselves to be deceived or to be deluded by the statements that have no basis other than in the heart of the man who has no thought of his oath on the witness-stand. There is a maxim of the law that a witness false in one particular should be distrusted in others, and if your judgment approves you can reject all his testimony.

As to the evidence in this case, as the Court has stated to you it is its duty to pass upon the competency and admissibility of the evidence, and when it has done so and allows it to go in evidence, all questions in respect to that are in the case and you accept the evidence and consider it. The officers go out to this place occupied by the defendant Alvau [79] and his family, a little farm, house and barn, as they had a right to do. They had a right to do it for several reasons: First, that it is a violation of the revenue laws, and these same revenue laws provide that the officers of the Government have a right to enter a distillery at any time and discover who is operating it, gauge the liquors, and to assess and collect the

taxes, and to destroy contraband utensils and production. So they enter properly, as the Court says, they find Alvau upstairs; after a long search they discover this distillery. You can see the length to which the law-breaker goes to foil the efforts of the Government to maintain the laws and to punish the criminal. It took them several hours to find the secret opening into this distillery, in the basement. And when they get in there, what do they find? They find Rossi in there, and they find the still. The still had been operating. It was operating when they went there—they smelled its operation. They find a still five feet in diameter; they find a thousand gallons of mash, a full-fledged distillery, Gentlemen of the Jury, and the three officers, Carr, Griffith and Kinnaird, all told you that Rossi told them he came there the day before to work a while with and for Alvau.

Now, Rossi takes the stand and tells you that he just was out there on some business of renewing insurance policies, and, hearing a clamor outside, Alvau hid him there to hide him from prospective burglars, although the children and wife were allowed to take their chances with the desperate burglars that were expected to be outside; and he says he was not working there at all, did not know anything about this [80] still; that it happened that he got up and simply put on Alvau's overalls instead of his own clothes because his had fallen down; that is his statement of how he

came to be in this guilty situation which the officers have described. He denies that he told them he was working there, also. Which do you prefer to believe, the three officers of the United States, the police, the Sheriff of the United States, the same as the police and sheriff of the states, with a duty to discharge and discharging it under great difficulties always, as you well know, or will you believe the man who is charged with serious offenses, the consequence of which will be serious to him, at the lightest, if convicted? And ask yourselves whether his self-interest, which is the strongest motive that moves any man to act, has inspired him to state to you this account of his situation there in order to persuade you to believe it, or hoping that there is a fellow feeling in the breast of some juror which would inspire him to accept it, or at least to entertain a reasonable doubt, so as to secure an acquittal and go free of these offenses, if committed. It is not necessary that he should have owned the still or the premises. He who aids another to violate the law is himself as guilty as the principal actor. One who gets another to commit a crime for him, and it is committed, is as guilty of the act as he who did commit it. If one man employs another to work on a still which is running in violation of the law, the man employed is as guilty as the employer.

So that is the situation and the case for you, Gentlemen of the Jury. The Court need not

go over the evidence any further. [81] Because the Constitution of Washington, adopted by the Constitutional Convention, and ratified by a popular vote of the people before the admission of the State into the Union, expressly forbids a Judge in instructing a jury, to comment on the evidence in the case in its instructions to the jury, the District Court erred in commenting on the evidence in its instructions to the jury; and for the further reason that the instructions of the Court prevented the jury from functioning and doing its duty as sole and exclusive judges of the facts, thereby denying the defendants the right of trial by jury.”

8. The Court erred in admitting Government’s exhibits, over the objection of counsel for the defendants:

Mr. DeWOLFE.—We offer these in evidence—1 to 8.

The COURT.—Admitted.

Mr. CHAVELLE.—We object to them offering these in evidence, and at this time we renew our petition to suppress the evidence.

The COURT.—The objection will be overruled for the present. When the evidence is all in, if you have made out a case showing that the evidence was illegally gotten, the Court will rule on it then.

9. The Court erred in limiting the cross-examination of the witness, Kinnaird, as follows:



The COURT.—Vacate the stand. You are referring to a transcript.

Mr. CHAVELLE.—I was trying to refresh my recollection from transcript, your Honor. Note an exception.

The COURT.—Let it be vacated.

for the reason and upon the ground that the record shows said case was continued until three o'clock in the afternoon, 80 pages of testimony were taken, and the case summed up by both sides, by 5:10 o'clock P. M. on the same day, and that the defendants were precluded [82] from having a fair trial by the restriction of the Court upon the cross-examination of the witness Kinnaird.

10. The Court erred in denying the defendants' motion to suppress the evidence, made at the end of the Government's case, as follows:

Mr. CHAVELLE.—We renew our motion to suppress the evidence.

The COURT.—It appears from the evidence of the officers, the agents of the prohibition office, that they went to this place to investigate. When they got within a distance of the house or premises they smelled fermenting mash. As they came closer to the buildings it got stronger, and as they got near the residence they smelled not only the mash but the odor of kerosene and of the still in operation.

These officers were not alone prohibition agents, but they had the authority of revenue officers. The premises was a distillery. They found this still below, that had been recently

operated, and they found the mash. That comes under the Revenue Statute. The law is that revenue officers may enter a distillery at any time to discover who is operating it, gauge the liquor, and destroy anything that is illegally being carried on, which these officers did. They cannot camouflage a distillery like this one by having the entrance in a dwelling-house so they cannot enter.

The Court rules that the evidence was legally secured and is competent. Therefore, the motion is denied.

Mr. CHAVELLE.—Exception.

The COURT.—It will be noted.

Mr. CHAVELLE.—At this time, I move to strike all the testimony— [83]

The COURT.—Motion denied.

Mr. CHAVELLE.—(Continuing.) —of each and every one of the Government's witnesses.

The COURT.—Exception.

Mr. CHAVELLE.—I make a motion at this time for a directed verdict.

The COURT.—Denied.

Mr. CHAVELLE.—Note an exception.

11. The Court erred in permitting the witness, Mrs. Mary Alvau, to testify over the objection of Frank Alvau, her husband:

Mr. DeWOLFE.—You knew the still was down there, didn't you?

Mr. CHAVELLE.—I object to that as immaterial. It is not cross-examination.

The COURT.—She may answer. Overruled.

Q. You knew the still was down there, didn't you?

Mr. CHAVELLE.—Exception, your Honor.

Mr. DeWOLFE.—What is that?

Mr. CHAVELLE.—Allow me an exception.

The COURT.—Yes.

Q. Didn't you know your husband went down there and ran the still?

Mr. CHAVELLE.—Objected to for the same reason.

A. I don't know.

The COURT.—Overruled.

Mr. CHAVELLE.—Exception.

Q. You didn't see any still paraphernalia or manufacturing articles down there at all, never have been?

A. After the federals came there I heard about lots of things and see this in there and that was—well, that is all.

Q. Who does that still belong to? It belongs to your husband, doesn't it? [84]

Mr. CHAVELLE.—Objected to as leading and suggestive and not proper cross-examination.

The COURT.—Overruled.

A. I don't know.

Q. You don't know the still belongs to him?

A. May belong to him and may not.

Mr. CHAVELLE.—Same objection.

The COURT.—I think you have pursued that far enough.

Mr. CHAVELLE.—Note an exception.

as compelling the wife to testify against her husband, contrary to the laws and statutes of the State of Washington, and an invasion of the rights of the defendant Alvau.

12. The Court erred in refusing to admit testimony taken before the United States Commissioner, which was attached to the defendants' petition to suppress the evidence, and by reference made a part thereof:

Mr. CHAVELLE.—And the Commissioner's testimony attached to the petition to suppress.

Mr. DeWOLFE.—I object to that as not proper.

The COURT.—Sustained.

13. The Court erred in denying the defendants' motion for a directed verdict, to suppress the evidence, and to strike the testimony, made at the close of the case, as follows:

Mr. CHAVELLE.—That is all. We renew our motion for a directed verdict.

The COURT.—Denied.

Mr. CHAVELLE.—We renew our motion to suppress the evidence.

The COURT.—Motion denied.

Mr. CHAVELLE.—And renew my motion to strike the testimony.

The COURT.—Motion denied. [85]

Mr. CHAVELLE.—And in each case I ask the Court to allow an exception.

The COURT.—Exceptions allowed.

14. For all the reasons set forth in the foregoing

assignments of error, the Court erred in denying the defendants' motions in arrest of judgment.

15. For all the reasons set forth in the foregoing assignments of error, the Court erred in denying the defendants' motion for new trial.

16. The Court erred in pronouncing judgment upon each of the said defendants.

WHEREFORE, plaintiffs in error severally pray that the judgment of said Court against him be reversed and this cause be remanded to said District Court with instructions to dismiss the same, and to discharge the plaintiff in error from custody, and exonerate the sureties on his bond, and for such other and further relief as to the Court may seem proper.

EDWARD H. CHAVELLE,  
JOHN B. WRIGHT,

By EDWARD H. CHAVELLE,

Attorneys for Plaintiffs in Error.

315 Lyon Building, Seattle, Washington.

Copy rec'd Dec. 12, 1928.

DeWOLFE,  
Asst. U. S. Atty.

[Endorsed]: Filed Dec. 12, 1928. [86]

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[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Come now the defendants, by their attorneys, Edward H. Chavelle and John B. Wright, and file

herein and present to the Court their petition praying for the allowance of an appeal and assignment of error intended to be urged by them, praying also that a transcript of the records and proceedings and papers upon which judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial District, and that such other and further proceedings may be had as may be proper in the premises.

On consideration thereof, the Court does allow the appeal of the defendants, upon the said defendants each giving bond according to law, in the sum of \$1,500.00 each.

Dated at Seattle, Washington, this 13th day of December, 1928.

BOURQUIN,  
Judge.

Received a copy of the within order allowing appeal this 13th day of Dec., 1928.

ANTHONY SAVAGE,  
Attorney for \_\_\_\_\_.

[Endorsed]: Filed Dec. 13, 1928. [87]

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#### APPEAL BOND (FRANK ALVAU).

KNOW ALL MEN BY THESE PRESENTS: That we, Frank Alvau, as principal, and the New Amsterdam Casualty Company, as sureties, jointly and severally acknowledge themselves to be indebted to the United States of America, in the

sum of Fifteen Hundred Dollars, lawful money of the United States, to be levied on our goods and chattels, land and tenements, upon the following conditions:

The condition of this obligation is such that whereas the above-named defendant Frank Alvau was on the 4th day of December, 1928, sentenced to serve eight months in the King Co. jail and pay a fine of \$1,000.00 in the above-entitled cause;

AND WHEREAS said defendant has sued out a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit to review such judgment;

AND WHEREAS the above-entitled court has fixed the defendant's bond to stay execution of said sentence in the sum of \$1,500.00,—

NOW, THEREFORE, if the said defendant Frank Alvau shall *diligent* prosecute said writ of error and shall render himself amenable to all orders which said Circuit Court of Appeals shall make or order to be made in the premises, and to all process issued or ordered to be issued by said Circuit Court of Appeals, and shall not leave the jurisdiction of the court without permission being first granted, and shall render himself amenable to any and all orders made or entered by the District Court of the United States, for the Western District of Washington, Northern Division, then this obliga-

tion shall be void; otherwise to remain in full force and effect.

FRANK ALVAU,  
Principal.

NEW AMSTERDAM CASUALTY COM-  
PANY. (Seal)

A. H. KEES,  
Atty.-in-fact.

J. D. O'MALLEY,  
Agent.

Approved this 13th day of December, 1928.

BOURQUIN,  
United States District Judge.

Approved as to form.

DeWOLFE,  
Assistant U. S. Attorney.

[Endorsed]: Filed Dec. 13, 1928. [88]

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[Title of Court and Cause.]

APPEAL BOND (HUMBERT ROSSI).

KNOW ALL MEN BY THESE PRESENTS:  
That we, Humbert Rossi, as principal, and the New Amsterdam Casualty Company, as surety, jointly and severally acknowledge themselves to be indebted to the United States of America in the sum of Fifteen Hundred Dollars, lawful money of the United States, to be levied on our goods and chattel, land and tenements, upon the following conditions:

The condition of this obligation is such that



whereas the above-named defendant Humbert Rossi was on the 4th day of December, 1928, sentenced to serve eight months in the King Co. jail and pay a fine of \$1,000.00 in the above-entitled cause;

AND WHEREAS said defendant has sued out a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit to review such judgment;

AND WHEREAS the above-entitled court has fixed the defendant's bond to stay execution of said sentence in the sum of \$1,500.00,—

NOW, THEREFORE, if the said defendant shall render himself amenable to all orders which said Circuit Court of Appeals shall make or order to be made in the premises, and to all process issued or ordered to be issued by the said Circuit Court of Appeals, and shall not leave the jurisdiction of the court without permission being first had, and shall render himself amenable to any and all orders made or entered by the District Court of the United States for the Western District of Washington, Northern Division, then this obligation shall be void; otherwise to remain in full force and effect.

HUMBERT ROSSI,

Principal.

NEW AMSTERDAM CASUALTY COM-  
PANY. (Seal)

A. H. KEES,

Atty.-in-fact.

J. D. O'MALLEY,

Agent.

Approved this 13th day of December, 1928.

BOURQUIN,  
United States District Judge.

Approved as to form.

DeWOLFE,  
Assistant U. S. Attorney.

[Endorsed]: Filed Dec. 13, 1928. [89]

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[Title of Court and Cause.]

STIPULATION FOR EXTENDING TIME  
FOR LODGING BILL OF EXCEPTIONS,  
EXTENDING TERM OF COURT AND  
FOR LODGING RECORD (Filed December  
12, 1928).

IT IS HEREBY STIPULATED by and between the parties hereto, by their respective attorneys, that the time of the defendants for filing and serving and settling their proposed bill of exceptions herein be extended to and including the 7 day of January, 1929; that the present term of this court be extended for all purposes of this action until said bill of exceptions shall have been settled and certified; and that the time for filing the record with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and for docketing said cause, be extended until thirty days after the bill of exceptions has been settled and certified.

Dated at Seattle, Washington, this 12th day of December, 1928.

TOM DeWOLFE,

Asst. U. S. District Attorney.

EDWARD H. CHAVELLE,

JOHN B. WRIGHT,

By EDWARD H. CHAVELLE,

Attorneys for Defendants.

[Endorsed]: Filed Dec. 12, 1928. [90]

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[Title of Court and Cause.]

ORDER EXTENDING TIME FOR LODGING  
BILL OF EXCEPTIONS, EXTENDING  
TERM OF COURT AND FOR LODGING  
RECORD (Filed December 13, 1928).

Upon reading and filing the foregoing stipulation, IT IS HEREBY ORDERED that the time of the defendants herein, for serving and filing their proposed bill of exceptions herein, be and the same is hereby extended to and including the 31 day of December, 1928; that the present term of court be and the same is hereby extended for all purposes of this action until said bill of exceptions shall have been settled and certified; and that the time for filing the record with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit and for docketing said cause be and the same is hereby extended until thirty days after the settlement and certification of said bill of exceptions.

This 5th day of December, 1928.

BOURQUIN,  
District Judge.

[Endorsed]: Filed Dec. 13, 1928. [91]

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[Title of Court and Cause.]

ORDER EXTENDING TIME FOR LODGING  
BILL OF EXCEPTIONS, EXTENDING  
TERM OF COURT, AND FOR LODGING  
RECORD (Filed January 21, 1929).

Upon reading and filing the foregoing stipulation, IT IS HEREBY ORDERED that the time of the defendants herein, for serving, filing and settling their proposed bill of exceptions herein be and the same is hereby extended to and including the 26th day of February, 1929; that the present term of court be and the same is hereby extended for all the purposes of this action until said bill of exceptions shall have been settled and certified; and that the time for filing the record with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and for docketing said cause, be and the same is hereby extended until thirty days after the settlement and certification of said bill of exceptions.

Done in open court this 21st day of January, 1929.

NETERER,  
Judge.

[Endorsed]: Filed Jan. 21, 1929. [92]

[Title of Court and Cause.]

AMENDED BILL OF EXCEPTIONS.

BE IT REMEMBERED, that on the 19th day of November, 1928, at ten o'clock A. M., a motion to suppress the evidence in the above-entitled cause came on for hearing before the Honorable Edward E. Cushman, Judge of the above-entitled court, and after hearing the argument for the Government and for the defendants, and taking the matter under advisement, the Court referred said petition to suppress to the Honorable George M. Bourquin.

Thereafter, on November 26, 1928, the said motion to suppress was continued before the Honorable George M. Bourquin until the 3d day of December, 1928, at ten o'clock A. M., and thereafter the motion to suppress the evidence in said cause was continued to two o'clock P. M. on the same day. Plaintiff was represented by Mr. T. E. DeWolfe, Assistant United States District Attorney, and the defendants were represented by their attorney, Mr. Edward H. Chavelle.

The said petition to suppress was directed to the things and articles seized at the residence and home of the defendant, Frank Alvau and his family, at Redondo, in King County, Washington, for the reasons and upon the grounds:

1. That the petitioner on or about the 12th day of July, 1928, and also subsequent thereto, resided with his family on a [93] ranch of 14 acres, consisting of a private dwelling-house which was his

residence at the time of the unlawful search and seizure complained of herein, and the private dwelling-house of the said petitioner was searched, and an unlawful seizure made therefrom without a search-warrant and without any warrant whatsoever, or authority of law, under the following facts and circumstances:

The prohibition agents in the night-time on the said 12th day of July, 1928, at about three A. M. o'clock, without any search-warrant and without any warrant whatsoever, or authority of law, battered down the door of the private dwelling-house of the petitioner and his family, breaking the door sill and the lock that securely fastened the same, and without due process of law or any legal authority whatsoever, unlawfully and wrongfully entered the private dwelling-house of the said petitioner and his family, and proceeded to search the said dwelling-house, stating to said petitioner that they were prohibition agents, and upon being requested for their authority and a search-warrant, they stated that they did not need a search-warrant, but had a right to search without any warrant whatsoever.

Thereafter the said search continued for a period of nearly five hours, and during said period the said officers moved about the personal belongings of the said petitioner in the said premises, and unlawfully and illegally searched and seized certain articles belonging to the said petitioner, without any search-warrant whatsoever, in violation of the constitutional rights of said petitioner under

the Fourth and Fifth Amendments to the Constitution of the United States, and in violation of Article I, Sections 6 and 9, of the Constitution of the State of Washington, guaranteeing a person against unlawful search and seizure in his home.

2. That no business of any kind was transacted or carried [94] on in petitioner's said dwelling-house by petitioner, and no intoxicating liquor was unlawfully sold thereon, and the said dwelling-house was used solely as a private dwelling, by petitioner and his family.

3. That there was no affidavit or complaint upon which a lawful and valid search-warrant could issue, showing that intoxicating liquor containing more than one-half of one per cent by volume, and fit for use for beverage purposes, was unlawfully sold in the said dwelling-house; that there was no complaint or affidavit which set forth facts upon which probable cause for belief that such intoxicating liquor was so possessed or could be found could be based.

4. That there was no complaint or affidavit whatsoever containing a statement of facts upon which the existence of probable cause for the issuance of a search-warrant could be found.

5. That there was no complaint or affidavit describing the premises directed to be searched, or any search-warrant whatsoever, and the said premises were not particularly and definitely described in any search-warrant directed against said premises. There was no search-warrant executed by a person to whom it could have been directed.

6. That without any warrant whatsoever a private dwelling-house in which intoxicating liquor was not unlawfully sold was searched.

And the affidavit attached to the petition to suppress alleges that the said dwelling-house consists of six rooms and basement, located on 14 acres of land belonging to Frank Alvau; that he had lived in the said premises with his family for a period of more than two years prior to the 12th day of July, 1928, and on said day and subsequent thereto, and at the time of making his affidavit was [95] still living in the premises. That on the 12th day of July, 1928, at about three o'clock A. M., certain prohibition agents entered said premises of the said Frank Alvau, by battering down a door to the dwelling-house, which was securely fastened and locked, and breaking the sill of said doorway and the said lock, and entered the said dwelling-house and proceeded to search the same, without any legal or lawful search-warrant, and without any warrant whatsoever, and took from the premises certain articles belonging to the said defendant, in violation of the Constitutional rights of said defendant under the Fourth and Fifth Amendment to the Constitution of the United States, and in violation of the Constitution of the State of Washington, Article I, Section 6 and 9.

Thereupon the following proceedings were had:

Mr. CHAVELLE.—I am ready for trial, except that there is a petition to suppress, which I understand your Honor is going to—



The COURT.—I will pass on it after I have heard the trial.

Mr. CHAVELLE.—May I make the motion, so that the record will show it was timely made.

The COURT.—Yes.

Mr. CHAVELLE.—In a few words, it is this, that the private dwelling-house of the defendant Frank Alvau was searched in the night-time without a search-warrant.

The COURT.—Haven't you your motion on file?

Mr. CHAVELLE.—Yes.

The COURT.—What is it you want to do?

Mr. CHAVELLE.—For the purpose of making the record, for the [96] purpose of permitting the Court to rule and allow me an exception, I wanted to show that the motion was disposed of or came up timely. It has to be made.

The COURT.—The record will show for itself. It shows that it is filed. The Court has said it will not hear it until it hears the trial of the whole case. It will be tried together. If you are entitled to the final motion, you will get it then.

Mr. CHAVELLE.—Will your Honor allow me an exception to the Court's ruling?

The COURT.—Yes. (Tr., p. 2.)

Thereupon further hearing of the case was continued until three o'clock P. M. of the said 3d day of December, 1928. The Court proceeded to empanel the jury to try the case, and said jury was duly empaneled and sworn. Opening statements were made on behalf of the respective parties, whereupon the following proceedings were had:

TESTIMONY OF C. H. GRIFFITH, FOR  
PLAINTIFF.

Thereupon C. H. GRIFFITH was called as a witness for the plaintiff, and after being duly sworn, testified:

I am a Federal Prohibition Agent. On the morning of the 12th of July, 1928, I went to the premises of the defendant Frank Alvau, located in King County, at about five o'clock in the morning. At a point 500 yards or possibly a little more from the house, we smelled the odor of fermenting mash. We thought it was in the barn. We went first to the barn but there was nothing there, and going on around the barn between the house and the barn, we then smelled the mash strong and could smell the kerosene burners. The house is set upon a high knoll. There was a full concrete basement under the house, a back door and front door. One of the boys [97] went to the front door, another to the back door, and I went to the basement door. I examined into the basement and called out and told them who we were. No one came to the door and no one answered. I heard someone running across the basement floor as I pushed the basement door in with my shoulder, and saw someone disappearing up the steps. I went after them, up the steps to the kitchen and then to the second story, and found the defendant Alvau. I took him again to the basement below and returned to the house to look through it. There was

(Testimony of C. H. Griffith.)

no evidence of the still in the house. The basement was searched. We then went out doors to find a runway leading into the basement. Two of the boys then returned to town. When they came back we found a round vault door leading out of the basement. In this we found a thousand gallons of mash, a 200-gallon still, 40 gallons of whiskey, and the defendant Rossi. The still had just been shut down.

Q. I ask you if you saw a mash vat outside, or a disposal vat out in the yard?

Mr. CHAVELLE.—Objected to as leading and suggestive.

The COURT.—Overruled.

A. What kind of a vat?

Q. (Mr. DeWOLFE.) A mash disposal vat.

A. No, a sump pit,—

Mr. CHAVELLE.—I object to that as not responsive and ask to have it stricken. He says “No.”

Q. (Mr. DeWOLFE.) Describe the pit you are speaking about.

A. It was just a sump for the aforesaid mash to be disposed of—rocks and such, dirt on top.

Q. Did you see it before you entered the house?

A. Yes.

Q. And did you smell mash coming out from that pit there? [98] A. Yes.

Mr. CHAVELLE.—Objected to as leading.

The COURT.—Yes. He has answered.

(Testimony of C. H. Griffith.)

Q. How much mash was in there—disposed of mash in the pit?

A. You could not state it—how much of it seeped through the ground.

Q. State whether or not it was steaming.

A. It was steaming.

Mr. CHAVELLE.—It is all leading. I would like to have counsel cautioned.

The COURT.—It is not too leading. I do not think there could be any dispute over any of these facts.

Rossi stated that he worked for some insurance company, but had gone out to work for a few days for Alvau, and had gone out the night before and was working for him then. Alvau explained the construction of the basement to me, that the still was in, and explained how he made the door, which weighed about 500 pounds, explained how he got the still in there. The still-house was out to one side. The vault door led out of the basement into a two-story still-house built of concrete about eight inches thick, the walls, even the concrete ceiling. He had built a door leading from the basement of the house into the still. The door was about two feet in diameter. None of it was under the main part of the house. There was a little lean-to built out to the rear, running along the basement steps, that was over the still-house, as I recall it. The porch was used to store foods in—potatoes. The still contained two pressure tanks and burners and coil. There was a mash tank with 500 gallons of mash.

(Testimony of C. H. Griffith.)

In my opinion the still was made there and the dwelling-house constructed around it. There was a cold air shaft from the still to a well about 75 or 100 feet distant. [99]

Q. Did you discover that prior or subsequent to the time of the entry of the house proper?

A. After.

I arrived on the premises about 5 or 6 o'clock in the morning. I went up on the roof to smell the chimney and smelled the fumes up there. (Tr., pp. 3-13).

On cross-examination, the witness further testified as follows:

Q. Mr. Griffith, they had no search-warrant?

A. No, sir.

Q. And you searched the dwelling-house?

A. Well, I looked around it, was through it.

I had been requested by a superior officer to go out to the dwelling-house and look for a still.

Q. As a matter of fact, the premises were all—the dwelling-house rested completely upon the foundation that you speak of, there was no outside—

A. Which foundation?

Q. The protrusion—there was no part of the premises that protruded past the foundation of the dwelling-house?

A. Well, there is a square foundation that the dwelling-house proper sat on, and then there is an offset that the still-house was under, of about eight feet.

(Testimony of C. H. Griffith.)

Q. And there was nothing over that except this lean-to porch?

A. That is it, nothing else.

Q. And the kitchen and bathroom were not over that?      A. No, the kitchen was over the—

Q. I asked you if the kitchen and bathroom—answer the question, will you?      A. No, sir. [100]

Q. How many times were you out there, more than once?      A. Twice.

Q. What particular times were you out there?

A. I went into town and got the agent to come out.

Q. You were out there twice the same day?

A. Yes.

Q. That is the only time you saw the premises?

A. Yes.

I do not remember who was present when Rossi made his statements to me. (Tr., pp. 13-16.)

On redirect examination, the witness further testified as follows:

Government's Exhibits 1 to 8, inclusive, were taken from the still-house of Alvau. Government's Exhibits 1 and 2 are samples of moonshine taken from the 40-gallon barrel and a sample of the mash or moonshine taken from one of the mash vats. The mash shown and the distilling apparatus were taken to Tacoma and placed in the custody of Agent Kinnaird. (Tr., pp. 16-17.)

## TESTIMONY OF H. E. CARR, FOR PLAINTIFF.

Thereupon H. E. CARR was called as a witness for the plaintiff, and after being duly sworn, testified:

I am a prohibition agent, and went to the premises of the defendant Alvau on the 12th of July, 1928. We smelled the odor of fermenting mash and followed the odor across the field to the barn. Searched the barn and found nothing. From the south side we walked around to the north side of the barn toward the house and again smelled the mash and at this time could also smell hot kerosene. I went to the backdoor of the dwelling-house, Agent Griffiths to the basement door and Agent Raney to the front door. I knocked on the rear door and told them I was a Federal officer, and [101] to open the door. No one came to the door, and after a while I could hear Agent Griffith break into the basement door. In a short time he came to the back door where I was and unlocked the door. At this time he had the defendant Alvau with him. We then went to the basement to see if the still was there. Could not find it, and we then made a search around the outside of the premises, and we could find no way to get into the still. The house was built on a rise in the ground. We went back to town and returned to the premises about 7:30 or 8 o'clock with Agent Kinnaird. After about a half hour's search Mr. Kinnaird found the opening in

(Testimony of H. E. Carr.)

the northeast corner of the basement that led into the still. In there was the defendant Rossi dressed in common blue shirt, a pair of blue overalls and a pair of shoes and stockings. He had no underwear on. The temperature of the room was very hot. In the first room was a 500-gallon vat of steaming mash, and the dome of the still coming up from the floor below. In another corner was a manhole leading to the room below. In this room was another 500-gallon vat of mash and the steam was so hot you could not put your hand on it until the heat had been turned off. To the right were 2 15-gallon pressure tanks embedded in concrete. There were numerous other articles found. The still-house was between the back porch and the house. On the back porch were brooms and mops and a basket of vegetables. The wall between the basement and the still-room was 6 inches thick, and the entrance to the still-room from the basement was about 2 feet in diameter, and the still was about the same width. It was about four or five hundred yards from the premises that we first smelled the odor of mash emanating from the premises. I had no conversation with Mrs. Alvau in the presence of the defendant. Prior to the seizure of the still I went into the kitchen and had a cup of coffee, but did not interfere with any of the personal belongings [102] of the defendants, other than the still apparatus, moonshine and mash. The rest of the outfit was destroyed. There was a tunnel dug under the floor of the basement to the chimney of the



(Testimony of H. E. Carr.)

house, which ran the entire depth of the house. There was another tunnel from the right side of the house to a well about 50 feet distant, which was a fresh air vent. Rossi said that he came there the night before to work for Mr. Alvau. No one said in my presence that anyone shut off the still. Government's Exhibits 1 to 8 inclusive are known to me. Government's Exhibit 1 is a sample of the whiskey that was taken from the 50-gallon barrel in the still on July 12th. No. 2 is a sample of the mash that was taken from a 500-gallon vat in the still. No. 3 was in the mash vat and used for heating the mash. No. 4 is the top of the dome of the still, and 6, 7 and 8 are the connecting parts from the dome down to the still. No 5 is the hinge used on the door into the still-house. (Tr., pp. 17-23.)

On cross-examination the witness further testified as follows:

I had no search-warrant. I made out a report in the case in which I stated the time I arrived at the premises. I do not think I stated that I got there at three o'clock in the morning. I imagine that Mr. Kinnaird made the case report. I always advise Mr. Kinnaird when he is not there, what happens prior to his getting there, but I do not know whether I told him in this particular case.

Q. You say that the part that you call the still-room was outside—what, protruded out away from the foundation of the house?     A. Oh, yes.

(Testimony of H. E. Carr.)

Q. And it was not directly under the kitchen of the house and the bathroom of the house?

A. No, sir. [103]

Q. And that there was some sort of a lean-to there, or porch, on the house? A. There was.

Q. And where did the lean-to on the porch come in? A. On the kitchen.

Q. The kitchen? A. Yes.

Q. And that was filled with utensils, cooking utensils or some kind of utensils, you say, there?

A. Yes, there was just—

Q. You heard Agent Griffith break into the premises? A. I did.

Q. Were you attacked by the defendant Alvau, by a gun? A. No, I was not.

Q. I am referring to your affidavit, which has been offered in this case, in resistance to the petition to suppress, and ask you if you there swore that—

Mr. DeWOLFE.—Is that on file?

Mr. CHAVELLE.—Yes.

Q. (Continuing.) “That before reaching the premises of said defendant Alvau the defendant Alvau came out from said premises and attempted to drive this agent, and the other Federal Prohibition Agents from the vicinity with a gun.”

A. That is my affidavit, yes, sir.

Q. Is that true? A. It is not.

Q. It is not true.

Mr. CHAVELLE.—I will offer this in evidence.

(Testimony of H. E. Carr.)

Q. That is sworn to by you. The original is on file.

The COURT.—Let him see it. [104]

Q. You made that affidavit?

A. The affidavit was made. I signed it.

The COURT.—The question is: Did you make an affidavit with that in it? Do you want to examine the affidavit?

A. I made an affidavit with that in it, yes.

Q. And it is not true? A. It is not.

Q. The 15th day of October, 1928, is the affidavit, and that is your signature? A. Yes.

Q. Sworn to before A. C. Bowman, United States Commissioner? A. Yes, sir.

Mr. CHAVELLE.—That is already in evidence, I assume, your Honor.

The COURT.—No, no, we try this case on the testimony here. We will have no affidavits unless you introduce it to impeach him.

Mr. CHAVELLE.—I will offer it in evidence. (The affidavit above referred to was marked Defendants' Exhibit 9.)

The dwelling-house was located on a large piece of land, in a high state of cultivation, garden, etc. We searched until about 7 o'clock. Mr. Raney and I went to town and returned with Mr. Kinnaird, about eight o'clock, and after a half hour or hour's search the still was found then. (Tr., pp. 23-28.)

On redirect examination the witness further testified as follows:

I was not chased by the defendant Alvau with a

(Testimony of H. E. Carr.)

gun. I made a mistake in the affidavit because I thought it was the same affidavit I had read at some other time, and later I executed an [105] affidavit correcting the mistake. (Tr., pp. 28, 29).

On recross-examination the witness further testified as follows:

I do not know whether the new affidavit was ever served or filed. I am in the habit of reading affidavits that I make before I swear to them. I read this affidavit, and signed it after I had read it. I read the affidavit in Mr. Whitney's office and checked out the parts—I don't remember just what they were—that I didn't want in there—because the affidavit was made by Mr. Smith. It was rewritten by one of the employees in the office and I took it over to Mr. Bowman and signed it there so I could get back to Tacoma and work that night. (Tr., pp. 29, 30).

Questioned by the Court, the witness further testified:

Q. You say you dug and found some mash. Where was this?

A. This was to the right of the house, on the edge of the property, about 25 or 30 feet.

Q. What sort of a place was it where you dug?

A. This was about six feet wide, and about 15 feet long, of loose dirt, and in the back yard—gravel or rocks. (Tr., p. 31).

(Testimony of H. E. Carr.)

On recross-examination the witness further testified:

Q. It was a cesspool, wasn't that where it was?

A. It was used as a cesspool and a drain for the mash also.

The COURT.—A drain?

A. The mash was made out of just sugar and water. There was no corn used, so that the mash would soak away in the loose dirt.

Q. (Mr. CHAVELLE.) There wasn't any drain to it, was there?

A. No, sir. (Tr., p. 31).

Questioned by the Court, the witness further testified:

Q. How much mash was there there? [106]

A. There was a thousand gallons—in the pit?

Q. Yes.

A. You couldn't see any. The opportunity we had to judge—smelling the mash that had been poured into it.

Q. (By Mr. DeWOLFE.) How did you know it was mash?

A. You could smell it. (Tr., pp. 31, 32).

On recross-examination the witness further testified as follows:

Q. You could not see, but you could smell mash?

Mr. DeWOLFE.—I object to that question.

The COURT.—Is there anything further?

Q. This was a cesspool, wasn't it?

A. It was used for both, yes, sir.

(Testimony of H. E. Carr.)

Q. It was the kind every dwelling-house has?

Mr. DeWOLFE.—I object to your testifying.

Mr. CHAVELLE.—I am not testifying.

Q. It is the customary thing that a dwelling-house in the country should have a cesspool or septic tank?

A. It was not a septic tank; it was just loose dirt.

Q. It was some distance from the house?

A. Yes.

Q. There were some flowers growing over it, weren't there?     A. No, I don't think so.

Q. It was on the premises?     A. Yes.

Q. There was vegetation growing there?

A. Yes. (Tr., p. 32).

Questioned by the Court, the witness further testified:

Q. How was this mash removed there, was there a pipe to it?

A. Yes, sir, we dug up, that is all, until we found the drain [107] leading from the house.

Q. What part of the house?     A. Beg pardon?

Q. What part of the house?

A. To the northeast corner of the house.

Q. (Mr. DeWOLFE.) I will ask you: That is the custom, is it not, on a set-up of this kind, to have a refuge for the mash—a mash pool outside of the house?

A. Absolutely.

Q. (Mr. CHAVELLE.) This is a dwelling-house?

A. Yes. (Tr., pp. 32, 33.)

TESTIMONY OF W. H. KINNAIRD, FOR  
PLAINTIFF.

Thereupon W. H. KINNAIRD was called as a witness for the plaintiff, and after being duly sworn, testified:

I am a Federal Prohibition Agent in charge of the Tacoma prohibition office. I have been a Federal Prohibition Agent since August, 1921. I went out to the premises of the defendant Alvau on the 12th day of August, 1928, in response to a message from agents Raney and Carr. They had gone out before me. Before entering the dwelling-house I could smell the odors of mash and kerosene. We went in the basement and looked around, moving chairs and boxes. In the northeast corner I moved a washing-machine and I could see a lid of steel about two feet in diameter, got down and pushed on it, and the door swung partially open. I could see a man's hand. I told him to turn the lights on. I told him who I was. He turned the lights on, and Mr. Rossi came out of the hole. I put the washing-machine back and closed the hole and called the other agents and showed them the hole, and when they entered we found the mash and still and whiskey. I talked to Rossi, one of the defendants, who said he had worked for the Metropolitan Life Insurance Company until the day [108] before, when he came to the Alvau place to work. No one said anything about turning the still off. The premises consist of a frame house, sit-

(Testimony of W. H. Kinnaird.)

ting on a concrete foundation, a full concrete basement. There are concrete stairs down to the basement. The sides of the concrete steps into the basement form a portion of the still-house. Entering from the basement I went into a concrete room, and then from there was a manhole going down into another room underground, and concrete. The hole into the still-house was about 2 feet in diameter. The covering of the hole was concrete and steel and there was a vault-like door of concrete, weighing about 500 pounds. Alvau said he drew up plans for the door and had it made in Seattle, and that it cost between fifty and seventy-five dollars, and weighed about 500 pounds. I did not notice any tunnel leading outside. I knew there was a vent there, but I did not follow it. It was in one corner of the still-house, with air pressure, that air came in. Outside of the house, I noticed where some one had been digging, and it was steaming there—hot mash. Referring to Government's Exhibits 1 to 8, they were turned over to me and have been in my custody since July 12th, the date of the seizure, and have remained unchanged. I tested the moonshine and it contained more than one-half of one per cent of alcohol by volume, and was fit for beverage purposes.

Mr. DeWOLFE.—We offer these in evidence, 1 to 8.

The COURT.—Admitted.

Mr. CHAVELLE.—We object to them offering



(Testimony of W. H. Kinnaird.)

these in evidence and at this time we renew our petition to suppress the evidence.

The COURT.—The objection will be overruled for the present. When the evidence is all in, if you have made out a case showing that the evidence was illegally gotten, the Court will rule on it then. (Tr., pp. 33–38.)

On cross-examination the witness further testified as follows: [109]

Q. Mr. Kinnaird, the premises were a dwelling-house? A. Yes, sir, it was a dwelling-house.

Q. Your agent didn't have a search-warrant?

A. Well, it is hearsay. I didn't see a search-warrant.

Q. You know there was no search-warrant?

The COURT.—They both answered that they did not.

Q. The premises belong to the defendant, Frank Alvau?

A. I could not say whether they do or not.

Q. Well, he lived there? A. Yes, he lived there.

Q. It was his dwelling-house?

A. Yes; he was living there.

Q. And he lived there with his family, his two children—his wife and his two children?

A. Yes. The place was in a state of cultivation, there was a garden and a cow.

Q. Now, you had been out in this locality before some time, before this 12th day of July, of course?

A. I had been by there, yes.

(Testimony of W. H. Kinnaird.)

Q. And you had a suspicion then that the place should be searched?

A. I had a suspicion that the place should be investigated.

Q. And that was about two weeks before the time that it was investigated? A. Yes, sir.

Q. And this suspicion arose because someone had told you that Frank had chased away people who were picking flowers? A. Yes.

Q. But you didn't bother to get a search-warrant. And how [110] far from the highway is the house—the nearest point on the highway, or how far—

A. I have only been to the premises from one way and that is from the road down to Redondo.

Q. There is a fence about the place, around the place?

A. I didn't go into the back. There is in front and along the side.

Q. You didn't go there originally with the agents? A. I did not.

Q. You sent the agents out there? A. I did.

Q. Told them to go out and investigate and see if they could find a still? A. Yes, sir.

Q. And that was based upon the information that you had secured, as you related, a couple of weeks before that time? A. Yes, sir.

Q. Did you notice the sill of the door was broken—the cellar door?

A. I don't know whether I did or not. I don't believe I did.

(Testimony of W. H. Kinnaird.)

Q. You didn't look, did you?

A. Well, I don't know whether I did or not.

Q. You had a case report made in this matter?

A. Yes.

Q. By these agents?

A. I made a report to Mr. Whitney.

Q. And did you state in the report that the agents got out there to the premises at three o'clock in the morning?     A. No, sir.

Q. You didn't state that? [111]     A. No, sir.

Q. Referring to your testimony before the United States Commissioner—I am now reading from a transcript of the testimony, a copy of the transcript—the original transcript is on file with the Court, attached to the petition to suppress—I will ask you whether or not in your testifying on the 20th day of July, 1928, at 2 o'clock P. M., before the Honorable H. G. Fitch, United States Commissioner, at Tacoma, Washington, you stated as follows:

“Q. Don't you keep any record of your officer's movements?

“A. I can't tell. I'll testify to what time they got out there.

“Q. Do you know?

“A. I have their record.

“Q. What time did they say they got out there?     A. Three o'clock in the morning.

“Q. That is their record, is it?     A. Yes.”

Did you so testify at that time and place?

A. I testified that they left town about three

(Testimony of W. H. Kinnaird.)

o'clock in the morning. I told you at the hearing that I had that record. I said it was hearsay.

Q. Did you so testify? I haven't asked you for anything else.

A. Yes, I testified before the Commissioner there.

Q. When, what time they left town and what time they got out there—you heard my question.

A. That is like I told you, I say I could not tell you what time they got out there.

Q. Did you understand me? A. Yes. [112]

Q. Did you understand it perfectly?

A. Yes, sir.

Q. There is no mistake. Did you so testify?

A. I testified before the Commissioner, yes.

Q. That the agents arrived at Frank Alvau's place at three o'clock in the morning?

A. As far as I knew, yes.

Q. And according to this record?

A. I don't know whether my record shows that or not.

Q. That is what you testified to. Did you so testify?

A. I testified according to that record there.

Q. Now, this was not a saloon, or a public place or a—

The COURT.—That stands admitted. You must prepare your case out of court, on your time, not in here on my time and the jury's.

Q. Did you take anything away from the place

(Testimony of W. H. Kinnaird.)

beside the contraband, there; did you take a gun, for instance?

A. One of the agents seized a gun, yes.

Q. I will ask if you testified before the United States Commissioner in Tacoma, at the same time and place, as follows:

“Q. Had someone advised you that the still was there?     A. Yes, sir.”

Mr. DeWOLFE.—I object as not proper cross-examination.

Q. (Continuing.)

“Q. Told you the still was there?

“A. No. They didn’t tell me the still was there, but they said it was a suspicious place, and I sent the boys out to see.”

Is that what you testified to? [113]

A. Yes, sir.

Q. Now, how far is this place from Redondo?

A. I would say around a half mile.

Q. And how far is that from this courthouse?

A. I could not tell you; I said it was a half a mile from Redondo, about.

Q. And how far is it from here, do you know?

A. I don’t know.

Q. And the—

The COURT.—Vacate the stand. You are referring to a transcript.

Mr. CHAVELLE.—I was trying to refresh my recollection from transcript, your Honor. Note an exception.

The COURT.—Let it be vacated. (Tr., pp. 38–44.)

Thereupon the Government rested.

Mr. CHAVELLE.—We renew our motion to suppress the evidence.

The COURT.—It appears from the evidence of the officers, the agents of the prohibition office, that they went to this place to investigate. When they got within a distance of the house or premises they smelled fermenting mash. As they came closer to the buildings it got stronger, and as they got near the residence they smelled not only the mash but the odor of kerosene and of the still in operation.

These officers were not alone prohibition agents, but they had the authority of revenue officers. The premises was a distillery. They found this still below, that had been recently operated, and they found the mash. That comes under the Revenue Statute. The law is that revenue officers may enter a distillery at any time to discover who is operating it, gauge the liquor and destroy anything that is illegally being carried on, which these officers did. They [114] cannot camouflage a distillery like this one by having the entrance in a dwelling-house so they cannot enter.

The Court rules that the evidence was legally secured and is competent. Therefore, the motion is denied.

Mr. CHAVELLE.—Exception.

The COURT.—It will be noted.

(Testimony of J. Charles Stanley.)

Mr. CHAVELLE.—At this time, I move to strike all the testimony—

The COURT.—Motion denied.

Mr. CHAVELLE.—(Continuing.) —of each and every one of the Government's witnesses.

The COURT.—Exception.

Mr. CHAVELLE.—I make a motion at this time for a directed verdict.

The COURT.—Denied.

Mr. CHAVELLE.—Note an exception. (Tr., pp. 44, 45.)

#### DEFENDANTS' CASE.

#### TESTIMONY OF J. CHARLES STANLEY, FOR DEFENDANTS.

Thereupon J. CHARLES STANLEY was called as a witness for the defendants, and after being duly sworn, testified:

By occupation I am an architect, and have been for 25 or 26 years.

Thereupon the Government admitted his qualifications in such profession.

At the request of counsel I made an examination of the premises at Redondo Beach known as the dwelling-house of Frank Alvau, and made a plan of the house, and have it with me.

(Witness produces plans.)

There are two sheets, the basement plan and the first floor plan of the house, marked for identifica-

(Testimony of J. Charles Stanley.)

tion and offered in evidence as Defendants' Exhibits 10 and 11 respectively. [115]

Q. Is there any part of the dwelling-house, any part of the basement of the dwelling-house, or the walls of the dwelling-house, that protrude beyond the dwelling-house itself? A. They do not.

Q. You have heard the testimony of Agent Carr and Agent Griffith and Agent Kinnaird here today. Is their testimony true or untrue?

Mr. DeWOLFE.—I object.

The COURT.—It will be for the jury to say what is true or not true.

Mr. CHAVELLE.—In relation to the part of the premises what was referred to as the still-room, what part of the dwelling-house is it that is over it?

A. It is directly under the kitchen and bathroom.

Q. Is there any lean-to in connection with the premises, or porch, back of the kitchen?

A. None, whatever.

Mr. CHAVELLE.—I will offer the exhibits in evidence (Tr., pp. 46, 47).

(The plans above referred to were admitted in evidence, and marked respectively, Defendants' Exhibits 10 and 11.)

#### TESTIMONY OF FRED C. CAMPBELL, FOR DEFENDANTS.

Thereupon FRED C. CAMPBELL was called as a witness for the defendants, and after being duly sworn, testified:

I am by profession an attorney at law. I have



(Testimony of Fred C. Campbell.)

examined the premises of Frank Alvau on October 30, last. The premises consist of a dwelling-house and basement. The house is considerably higher than the county road, and is about a thousand feet from the nearest road. The land surrounding the house is in a state of cultivation. It is a small ranch, chicken ranch, garden, cow and the like. I examined the foundation of the building. It is concrete, [116] extending clear around the house.

Q. Was there any part of the foundation or the walls or any concrete walls that protruded beyond the sill of the residence or the frame structure itself?

A. No. The walls of the house—the north wall of the house is a solid concrete wall, full length. There is sort of an “L” that extends out a little further than—that is, there is what you might call a notch one side where the stairway comes down into the basement; that is on the southeast corner. The north wall of the basement is solid concrete wall the whole length. That is the foundation.

Q. What is directly over the room referred to as a still-room?     A. Kitchen and bathroom.

Q. Is there any lean-to or porch?

A. Not on the east end where this kitchen and bathroom are.

Q. Was there any lean-to or porch that you saw at all?     A. Not on the east end of the house.

Q. Did you notice whether the sill of the basement door was broken?

A. There is a splinter or piece broken off the

(Testimony of Fred C. Campbell.)

door. I, of course, don't know how it got there.  
(Tr., pp. 48-50.)

On cross-examination, the witness further testified as follows:

There is no covered space over the steps leading into the house. There is no space there other than the steps, where the steps go in, to store things in.  
(Tr., pp. 50, 51.)

#### TESTIMONY OF LESTER D. UNGER, FOR DEFENDANTS.

Thereupon LESTER D. UNGER was called as a witness for the defendants, and after being duly sworn, testified:

I am manager of the Metropolitan Life Insurance Company. [117] One of the defendants, Humbert Rossi, worked for my company for about one year. His last day of pay was on July 14, 1928. He resigned his position with the company. (Tr., pp. 52, 53.)

#### TESTIMONY OF URBAN C. HUFF, FOR DEFENDANTS.

Thereupon URBAN C. HUFF was called as a witness for the defendants, and after being duly sworn, testified:

I am assistant manager of the Metropolitan Life. I have known Humbert Rossi for about one year. He was engaged all the time in the employment of my company. It was during July that he

(Testimony of Urban C. Huff.)

left the company. I do not remember the exact date. His general reputation for truth and veracity in the community in which he lives is good. (Tr., pp. 53, 54.)

On cross-examination the witness further testified as follows:

My opinion as to the general reputation of the defendant Rossi is based on what the neighbors say and general acquaintance. I have never made any inquiries, but I have never heard anything but good of him. I live in the same neighborhood that he does. (Tr., p. 54).

#### TESTIMONY OF DAVID LEVINE, FOR DEFENDANTS.

Thereupon DAVID LEVINE was called as a witness for the defendants, and after being duly sworn, testified:

I am president of the Seattle Central Labor Council. I know Humbert Rossi and have known him for eight years. He was employed in July, 1928, for the Metropolitan Life Insurance Company. I know his general reputation in the community in which he resides, for truth and veracity, and said reputation is good. I also know his general reputation in that community as to being a law-abiding citizen, and that reputation is good. (Tr., p. 55.) [118]

(Testimony of Humbert Rossi.)

On cross-examination, the witness further testified as follows:

I live four or five blocks from the defendant.  
(Tr., p. 56.)

#### TESTIMONY OF HUMBERT ROSSI, ON BEHALF OF DEFENDANTS.

Thereupon HUMBERT ROSSI, one of the defendants, after being first duly sworn, testified:

On the 12th day of July, 1928, I was working for the Metropolitan Life Insurance Company. I went out there to try to revive some insurance, that had been in existence with my company, and I had gone there to see about them being reinstated. I had insurance upon one of the members of the Alvau family upon which the premium was just past due. The premises of Alvau are 20 miles from Seattle, and the character of the premises is a regular farm with a garden, a cow and chickens, and partly for provision and partly for hay for the cow. The buildings were a two-story house with basement. There are four rooms downstairs, kitchen, living-room dining-room and bedroom, and two bedrooms upstairs. Frank Alvau lived there with his wife and children.

Q. The walls, the foundation walls, were there any of the walls, foundation or otherwise, protruding out beyond the structure or foundation upon which the sills of a house itself rested?     A. No, sir.

Q. Was there any lean-to?

(Testimony of Humbert Rossi.)

A. No lean at all of any kind.

Q. Or porch?

A. There was only a front porch, but no back porch.

I arrived there about eight o'clock or so in the evening, having taken a public bus. After I stayed pretty late talking insurance, Frank invited me to stay all night. It was a hard case to try to sell him. I stayed all night. I went to bed and in the [119] middle of the night heard the dogs barking. It was ten minutes or a quarter to three in the morning. It was dark and rainy. I asked Frank what was the matter and he said, "I am afraid they are burglars." We jumped out of bed and Frank said, "See what is wrong." I ran for my clothes in the closet. There was a hanger there and some hook, was the reason it fell to the floor, and I could not find my clothes. Frank threw me a pair of overalls and I put them on. I noticed a clock tipped over on its side and saw that it was about a quarter or ten minutes to three at that time. Then the lights went out. I went downstairs, with no socks, pair of shoes and overalls, and underwear that I slept in. We went to the window and we saw two or three men prowling around, and Frank said, "Look out, they are burglars." I could not distinguish whether they were men or women, but there was kind of a shadow. Frank said, "Hide, hide!" I asked him where I was going to hide, and he grabbed me by the hand and took me to the basement. He said, "Here is a place for you." We went to the wall and I heard

(Testimony of Humbert Rossi.)

him scratch something. He said, "Here is a place." I said, "No, I can't see nothing." He said, Lower yourself down," and put me there against the wall. He told me to stay there. It was dark. I moved around and felt an electric bulb, and tried to turn it on, but there was no electricity. I did not get out of there until Agent Kinnaird opened the door. I had been in the place about five hours. There were no walls of the dwelling-house that protruded outside the main structure upon which the dwelling-house rested. There was no lean-to or kitchen back porch. The place in which I was locked, was just underneath the kitchen and the bathroom. I worked for the Metropolitan Life Insurance Company after my arrest, for about a week or over, when I resigned because my name was in the papers in connection with this business. I have since been working in a grocery store. (Tr., pp. 56-63.)

[120]

On cross-examination, the witness further testified as follows:

I slept upstairs. Mr. Alvau was in another room upstairs and Mrs. Alvau slept downstairs. One of the children slept upstairs and the other down. I did not turn on the lights for the agent. He had a flashlight. I did not know anything about the still or mash. My clothes didn't smell of mash or whiskey. (Tr., pp. 64-66.)

(Testimony of Mrs. Mary Alvau.)

On redirect examination, the witness further testified as follows:

I examined the basement door of the house. The sill of the door was broken by force. (Tr., p. 66.)

TESTIMONY OF MRS. MARY ALVAU, FOR DEFENDANTS.

Thereupon Mrs. MARY ALVAU was called as a witness for the defendants, and after being duly sworn, testified:

I am the wife of the defendant, Frank Alvau. I live close to Redondo Beach, and have lived there about three years. The premises are a ranch, with a six-room dwelling-house. On the day in question I heard the dogs barking and somebody sneaking on the porch. The little girl looked out the window and said it was a lady. It was dark. Shortly after a man came in my room and said, "Pardon me, I have made a mistake." He then went upstairs. I heard my husband say, "Who is it?" I did not hear what the other man answered. I could not get up right away, and there were too many men around, and I had to stay in bed. I got up as soon as I could. I lived in the premises with my husband and two children. No part of the walls of the house or foundation protrude out beyond the house except the side wall. The kitchen and the bathroom are on the foundation. There is no lean-to or porch in the back or rear of the premises [121] next to the kitchen. There are no foundation walls

(Testimony of Mrs. Mary Alvau.)

beyond the main foundation of the house, upon which the house does not rest. The defendant Rossi came there to fix my life insurance and my husband's insurance, because it was a long time behind. He came there in the evening and stayed all night. (Tr., pp. 66-70.)

On cross-examination the witness further testified as follows:

Q. Did anybody else live there besides you and your children? A. No.

Q. You knew the still was down there, didn't you?

Mr. CHAVELLE.—I object to that as immaterial. It is not cross-examination.

The COURT.—She may answer. Overruled.

Q. You knew the still was down there, didn't you?

Mr. CHAVELLE.—Exception, your Honor.

Mr. DeWOLFE.—What is that?

Mr. CHAVELLE.—Allow me an exception.

The COURT.—Yes.

Q. Your husband ran it?

A. I don't catch you, what you mean.

Q. You knew there was a still down there?

A. I don't know nothing about it.

Q. You didn't? A. No.

Q. Anyone tell the officers at the time of the arrest, that there was a still there but that they would not find it? A. No.

Q. Didn't you know your husband went down there and ran the still? A. What? [122]



(Testimony of Mrs. Mary Alvau.)

Q. Didn't you know that your husband went down in the basement and ran the still?

Mr. CHAVELLE.—Objected to for the same reason.

A. I don't know.

The COURT.—Overruled.

Mr. CHAVELLE.—Exception.

Q. (Mr. DeWOLFE.) You didn't see any still paraphernalia or manufacturing articles down there at all, never have been?

A. After the federals came there I heard about lots of things and see this in there and that was—well, that is all.

Q. Who does that still belong to? It belongs to your husband, doesn't it?

Mr. CHAVELLE.—Objected to as leading and suggestive and not proper cross-examination.

The COURT.—Overruled.

A. I don't know.

Q. You don't know the still belongs to him?

A. May belong to him and may not.

Mr. CHAVELLE.—Same objection.

The COURT.—I think you have pursued that far enough.

Mr. CHAVELLE.—Note an exception. (Tr., pp. 71, 72.)

Mr. CHAVELLE.—Will your Honor permit me to call a child to testify to the character of the premises?

The COURT.—You have evidence on that line now. If you had prepared your case, instead of

(Testimony of W. H. Kinnaird.)

reading transcript and asking a lot of other desultory questions, we would have gotten along better.

Mr. CHAVELLE.—Note an exception to the remarks of the Court.

The COURT.—Note an exception. (Tr., pp. 72, 73.)

Thereupon the defendants rested. [123]

The record shows that the case was not commenced until after 3:30 P. M. o'clock on the 3d day of December, 1928, and all of the evidence was in, both sides had finished their arguments to the jury and the case was ready for the instructions by the Court, at three minutes after five o'clock on the same day, and that the transcript of record shows that 80 pages of testimony were taken.

TESTIMONY OF W. H. KINNAIRD, FOR  
PLAINTIFF (RECALLED IN REBUT-  
TAL).

Thereupon W. H. KINNAIRD was recalled in rebuttal by the plaintiff, and testified as follows:

Q. I will ask you if on July 12th, when you went on the premises of the defendant Alvau and went into the still-room, if you didn't ask the defendant Rossi to turn on the lights and if he didn't turn them on? A. He did.

Q. I ask you if at that time you didn't smell mash on the defendant Rossi's clothes. (Tr., p. 74.)

A. Yes.

TESTIMONY OF H. E. CARR, FOR PLAINTIFF (RECALLED IN REBUTTAL).

Thereupon H. E. CARR was recalled by the plaintiff, and testified as follows:

At the time of the arrest of the defendant Rossi, his clothing smelled of mash. He did not tell me at the time he was arrested that he was running the still. He did not tell any of the other agents in my presence, at the time he was arrested, that he was running the still. He said he came the night before to work for Alvau. When he got there, he found there was no ranch work, but the still was there, and he went to work at the still.

Q. I will ask you whether or not you didn't confer with Mrs. Alvau and have conversation with her to the effect that she said— [124]

The COURT.—Never mind; it is leading.

Mr. DeWOLFE.—I thought it was proper on rebuttal, your Honor.

Q. What conversation did you have with Mrs. Alvau with reference to whether or not there was a still there?

Mr. CHAVELLE.—He has already been asked the same question on direct.

The COURT.—Overruled.

Mr. CHAVELLE.—Exception.

A. She said there was a still there, but we would not find it. (Tr., pp. 75, 76.)

On cross-examination, the witness further testified as follows:

(Testimony of H. E. Carr.)

The defendant Rossi never told me at any time that he worked on the still. I stated on direct examination that Mrs. Mary Alvau, the wife of the defendant, had made no statement to me whatever.

Q. And when you were asked regarding Mrs. Mary Alvau, the wife of the defendant, didn't you state on direct, that she made no statement whatsoever?

A. If you will remember that—

Q. I ask you if you didn't so state on direct?

A. I did.

Q. How?

A. I stated she made no statement; that I stated in the main—

Q. That was said, that she made no statement, on direct? A. Yes, I did. (Tr., pp. 76, 77,)

Mr. CHAVELLE.—That is all. We renew our motion for directed verdict.

The COURT.—Denied.

Mr. CHAVELLE.—We renew our motion to suppress the evidence.

The COURT.—Motion denied. [125]

Mr. CHAVELLE.—And renew my motion to strike the testimony.

The COURT.—Motion denied.

Mr. CHAVELLE.—And in each case I ask the Court to allow an exception.

(Exceptions noted.) (Tr., p. 78.)

TESTIMONY OF J. CHARLES STANLEY, FOR  
DEFENDANTS (RECALLED).

Thereupon J. CHARLES STANLEY was recalled by the defendants, and testified as follows:

Q. Examining Defendants' Exhibit 11, which is the ground floor of the premises, I will ask you whether or not off the kitchen there shows a lean-to or porch? A. No, none.

Q. What are those marks there?

A. A couple of steps.

Q. Does that lead directly into the kitchen?

(Tr., p. 79.)

A. It does.

On cross-examination, the witness further testified as follows:

Q. When did you make your examination of those premises? A. About ten days or two weeks ago.

Q. You were never out there before ten days or two weeks ago, were you?

A. No, sir. (Tr., p. 79.)

Mr. CHAVELLE.—We have filed—I don't know your Honor's mode of procedure exactly—we have filed affidavits here in support of our petition to suppress. Are those affidavits a part of our record?

The COURT.—They are not. The Court has heard the whole matter together.

Mr. CHAVELLE.—May I offer the affidavits?  
[126]

The COURT.—You may.

Mr. CHAVELLE.—We will at this time offer the affidavits, then, that are filed in this cause and attached to the petition to suppress, namely, the affidavits of Annetta Alvau, Frank Alvau, Mary Alvau—

The COURT.—Any objection?

Mr. DeWOLFE.—No objection.

Mr. CHAVELLE.—(Continuing.) Fred Campbell and Stanley.

The COURT.—Very well, they will be considered as in, if the other side does not object.

Petition to suppress evidence was marked Defendants' Exhibit 15.

Affidavit of Frank Alvau was marked Defendants' Exhibit 16.

Affidavit of Humbert Rossi was marked Defendants' Exhibit 17.

The affidavit of Fred C. Campbell was marked Defendants' Exhibit 18.

The affidavit of Mary Alvau was marked Defendants' Exhibit 19.

The affidavit of Gino Alvau was marked Defendants' Exhibit 20.

The affidavit of Annetta Alvau was marked Defendants' Exhibit 21.

The affidavit of J. Charles Stanley was marked Defendant's Exhibit 22.

Mr. CHAVELLE.—And the Commissioner's testimony attached to the petition to suppress.

Mr. DeWOLFE.—I object to that as not proper.

The COURT.—Sustained. (Tr., pp. 79, 80.)  
[127]

After counsel for the plaintiff and for the defendants had argued the case to the jury, the Court instructed the jury as follows:

#### INSTRUCTIONS OF COURT TO THE JURY.

Having heard the evidence and the arguments, it is now the duty of the Court to deliver to you the charge, preliminary to your retirement to consider the verdict.

You will remember that you accept the law from the Court. The facts, what witnesses to believe, the inferences to draw from the circumstances, is entirely your function.

The indictment in this case charges that the defendants, in July of this year, in this county, unlawfully made mash in a building other than a distillery duly authorized according to the law. The statutes of the United States, the old revenue statutes, which have been on the books since the Government was founded, for the purpose of controlling and regulating the production of intoxicating liquors and collecting revenue—for they have always been very properly taxed—collecting revenue for the operation of the Government, provide that distilleries shall only be established under the supervision and authorization of the Commissioner of Internal Revenue, and that only where he has authorized the distillery shall mash be fermented for the production of intoxicating liquors; and any-

one who produces them elsewhere, or makes mash elsewhere, is subject to a penalty, if found guilty of the act.

The second count is that the defendants unlawfully established a still in a place contrary to law. The statute also provides that a still for the purpose of manufacturing intoxicating liquor shall not be set up anywhere but in an authorized distillery and never in a dwelling, and anyone who violates that law and is found guilty is punished accordingly.

And the third count is that the defendants unlawfully [128] carried on the business of a distillery without having given the bond required by law. In order that only responsible persons likely to be law-abiding will be permitted to distill intoxicating liquor, the law requires they shall give a bond to the United States, approved by the Commissioner of Internal Revenue, and anyone who distills liquors without giving that bond commits a crime for which, if found guilty, he shall be punished accordingly.

You have, however, nothing to do with the punishment in any case. The verdict you render is not according to the consequences to the defendants, it is not according to the punishment, but such verdict is according to the law and the evidence in the case.

The defendants have plead not guilty to these charges, and that raises in their behalf a presumption of innocence, which requires you to acquit them unless upon the evidence you find the presumption overcome and to a degree that leaves your judgment persuaded that they are guilty as charged beyond a reasonable doubt. You might find one of



them guilty and the other not guilty, or both guilty or both not guilty, dependent upon your judgment of the evidence in the case.

It is clear that all these crimes charged have been committed and the only question is who has had part and parcel in the commission of them. The Government is required to prove the guilt of the defendants—not beyond all doubt, because there is nothing susceptible of proof beyond all doubt, so the law says that the proof shall go simply beyond a reasonable doubt.

What is a reasonable doubt? Those words are about as clear as any others, but yet if we may attempt to clarify them, the Court will say that after you have considered all the evidence and the circumstances in the case, if you have not a persistent [129] judgment that to a very high degree of probability the defendants are guilty as charged, you have a reasonable doubt, and will acquit them. On the other hand, after that review, if you have a persistent judgment that to a very high degree of probability the defendants, or either of them, are guilty as charged, you have no reasonable doubt and you are bound to convict them or just the one as to whom you have no reasonable doubt. The judgment and the probability must not rest at all upon mere suspicion, upon conjecture, but must find a basis and a foundation in the facts and circumstances proven in the case before you. When I say that in certain contingencies you are bound to acquit or bound to convict, remember there is no compulsion on you but your oath of office—you are

officers of this court—your duty, your honor and your conscience, which, of course, is enough to bind any juror to a conscientious discharge of his duty.

The defendants, of course, are not required to prove their innocence, no matter whether they are innocent or not; that is not the question you put to yourselves. The question is: Are they proven guilty beyond a reasonable doubt? You may not believe that the defendants are innocent, yet it will be your duty to acquit them unless at the same time from the evidence you believe them proven guilty beyond a reasonable doubt. So, too, as I said before, you may have doubts of the defendants' guilt, still it would be your duty to convict them unless your judgment approves the doubt as a reasonable one.

If a case is strong against a defendant, he need not prove his innocence, and yet it may stand him well in hand to go as far in that direction as he can; but whether he proves his innocence or not, if at the conclusion of the case his version of it leaves in your mind a reasonable doubt of guilt, he must be acquitted. [130]

The credibility of the witnesses is for you. That applies as well to the defendants, when they testify, as to any other witness. You see them, you observe their demeanor, take note of the reasonableness or of the unreasonableness of their statements to you. Are they attempting simply to deceive you by unreasonable statements? Are they counting upon a lack of intelligence in the jury-box to persuade you to believe any sort of a puerile and silly story?

Remember, you are not obliged to believe a thing is so simply because some witness swears it is so. A witness can swear to anything, but whether it is to be believed or not is a matter for your judgment. As my predecessor in Montana, Judge Knowles, used to say, you are not obliged to believe anything solely because it is sworn to. A witness may take the witness-stand and swear strongly that down the street he saw an elephant climb a telegraph pole, but you are not obliged to believe it, even if he takes you down and shows you the pole. I tell you, Gentlemen of the Jury, I have heard them just about swear to that in court, and so have you. Your judgment will determine where to place credibility and not allow yourselves to be deceived or to be deluded by statements that have no basis other than in the heart of the man who has no consideration for his oath on the witness-stand. There is a maxim of the law that a witness false in one particular should be distrusted in others, and if your judgment approves you can reject all his testimony.

As to the evidence in this case, as the Court has stated to you it is its duty to pass upon the competency and admissibility of the evidence, and when it has done so and allows it to go in evidence, all questions in respect to that are *in foreclosed the case* and you accept the evidence and consider it. The officers go out to [131] this place occupied by the defendant Alvau and his family, a little farm, house and barn, as they had a right to do. They had a right to do it for several reasons: First, that it is a violation of the revenue laws, and these same reve-

nue laws provide that the officers of the Government have a right to enter a distillery at any time and discover who is operating it, gauge the liquors, and to assess and collect the taxes, and to destroy contraband utensils and production. So they enter properly, as the Court says, they find Alvau upstairs; after a long search they discover this distillery. You can see the length to which the lawbreaker goes to foil the efforts of the Government to maintain the laws and to punish the criminal. It took them several hours to find the secret opening into this distillery in the basement. And when they get in there, what do they find? They find Rossi in there, and they find the still. The still had been operating. It was operating when they went there—they smelled its operation. They find a still five feet in diameter; they find a thousand gallons of mash, a full-fledged distillery, Gentlemen of the Jury, and the three officers, Carr, Griffith and Kinnaird, all told you that Rossi told them he came there the day before to work awhile with and for Alvau.

Now, Rossi takes the stand and tells you that he just was out there on some business of renewing insurance policies, and, hearing a clamor outside, Alvau hid him in there to hide him from prospective burglars, although the children and wife were allowed to take their chances with the desperate burglars that were expected to be outside; and he says he was not working there at all, did not know anything about the still; that it happened that he got up and simply put on Alvau's overalls instead of

his own clothes because his had fallen down; that is his statement [132] of how he came to be in this guilty situation which the officers have described. He denies that he told them he was working there also. Which do you prefer to believe, the three officers of the United States, the police, the sheriff of the United States, the same as the police and sheriff of the states, with a duty to discharge and discharging it under great difficulties always, as you well know, or will you believe the man who is charged with serious offenses, the consequence of which will be serious to him, at the lightest, if convicted? And ask yourselves whether his self-interest, which is the strongest motive that moves any man to act, has inspired him to state to you this account of his situation there in order to persuade you to believe it, or hoping that there is a fellow feeling in the breast of some juror which would inspire him to accept it, or at least to entertain a reasonable doubt, so as to secure an acquittal and go free of these offenses, if he committed them. It is not necessary that he should have owned the still or the premises. He who aids another to violate the law is himself as guilty as the principal actor. One who gets another to commit a crime for him, and it is committed, is as guilty of the act as he who did commit it. If one man employs another to work on a still which is running in violation of the law, the man employed is as guilty as the employer.

So that is the situation and the case for you,

Gentlemen of the Jury. The Court need not go over the evidence any further.

In so far as Alvau is concerned, I understood from counsel's argument that there is really no denial that he is involved; it is simply a question of law to be tried out in the appellate tribunal. He did not testify in his own behalf. The law is, when he does not, from that mere fact alone you will draw no inference [133] against him. But there is the situation of this place. I need not comment on the testimony of the wife that she did not know it was there. It is wholly immaterial whether she knew it or not, but the question whether that is one of the stories like that of the elephant climbing a pole is a matter you may consider. So that the case does not depend at all upon that part of her testimony. She did testify—and you will take her other testimony in consideration in determining her credibility—she did testify that Rossi had simply come there on account of the insurance. What else he came for, if she did not know there was a still there, she probably would not know.

Gentlemen of the Jury, that is the case for you. The Court concludes as it began—the defendants are presumed innocent, and the law requires an acquittal unless from the evidence you believe them guilty beyond a reasonable doubt; then you will convict them.

When you go to the jury-room, you will select one of your number foreman. It takes twelve to agree upon a verdict. (Tr., pp. 81-89.)

Mr. CHAVELLE.—I note an exception to the in-

struction that the agent had a right to go into the basement—"as they had a right to do."

And further, allow me an exception to the defendants, and each of them, to the instruction that agents have a right at any time to go into a dwelling-house to search for a distillery. Isn't that one of the instructions?

The COURT.—Under the circumstances, where there was a distillery the agents of the Government had a right to enter, as the statute declares. [134]

Mr. CHAVELLE.—And the Court referred to the fact that there was a guilty situation here which Rossi found himself in—in which the officers found him.

The COURT.—Exception noted.

Mr. CHAVELLE.—And further, to the Court's comment upon the evidence, as being in favor of the Government and against the defendants.

Exceptions will be noted?

The COURT.—When you take them, they are taken. The Court neither allows nor disallows exceptions. (Tr., p. 89.)

Thereupon the jury retired to deliberate on their verdict.

The plaintiffs in error, Frank Alvau and Humbert Rossi, pray that this their bill of exceptions may be allowed, settled and assigned.

EDWARD H. CHAVELLE,

JOHN B. WRIGHT,

By EDWARD H. CHAVELLE,

Attorneys for Plaintiffs in Error.

315 Lyon Building, Seattle, Washington. [135]

[Title of Court and Cause.]

ORDER SETTLING AMENDED BILL OF EX-  
CEPTIONS.

The above cause coming on for hearing on this day, on the application of the defendants to settle their amended bill of exceptions, heretofore duly lodged in this cause; counsel for all parties appearing; and it appearing to the Court that the time within which to serve and file their bill of exceptions in the foregoing cause has been duly extended, and that said amended bill of exceptions as heretofore lodged with the Clerk is duly and seasonably presented for settlement and allowance; and it further appearing that said bill of exceptions contains all the material facts occurring upon the trial of the cause, together with the exceptions thereto, and all of the material matters and things occurring upon the trial, except the exhibits introduced in evidence, which are hereby made a part of said amended bill of exceptions by reference and incorporation; and the Court being fully advised, it is by the Court

ORDERED, that said amended bill of exceptions be and the same hereby is settled as a true bill of exceptions in said cause, which contains all of the material facts, matters, things and exceptions thereto occurring upon the trial of said cause, and the same is hereby certified accordingly by the undersigned Judge of this court, who presided at the trial of said cause, as a true, full and correct bill of exceptions; and the Clerk of the court is



hereby [136] ordered to file the same as a record in said cause, and transmit it to the Honorable Circuit Court of Appeals for the Ninth Circuit.

Settled in Butte. There is no evidence is in time. If is, the orders will be included.

Jan. 26, 1929.

BOURQUIN,  
United States District Judge.

Received a copy of the within amended bill of exceptions this 9 day of Jan., 1929.

ANTHONY SAVAGE,  
Attorney for Pltf.

[Endorsed]: Lodged Jan. 9, 1929.

[Endorsed]: Filed Jan. 28, 1929. [137]

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[Title of Court and Cause.]

ORDER TRANSMITTING ORIGINAL EXHIBITS.

It appearing to the Court that defendants request that Defendants' Exhibits 10 and 11 be transmitted with the Record on Appeal to the Circuit Court of Appeals for the Ninth Circuit, it is

ORDERED, ADJUDGED and DECREED that the original exhibits marked Defendants' Exhibit 10 and 11 be and the same are hereby ordered to be transmitted with the Transcript on Appeal herein to the Circuit Court of Appeals at San Francisco, California, to be considered as part of the appellate record herein.

Dated, Seattle, Feb. 11, 1929.

JEREMIAH NETERER,  
District Judge.

[Endorsed]: Filed Feb. 11, 1929.

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[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare copies of the following documents and papers in the above cause, and forward them under your certificate and seal to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, as a transcript of record in said cause, viz.:

1. Indictment.
2. Arraignment.
3. Petition to suppress evidence with transcript of Commissioner's hearing attached.
4. Plea of not guilty.
5. Record of day's trial and journal entry of order empanelling jury.
6. Verdict of guilty.
7. Opinion of Judge.
8. Affidavit of Fred C. Campbell.
9. Affidavit of Gino Alvau.
10. Affidavit of Annetta Alvau.
11. Affidavit of Mary Alvau.
12. Affidavit of Frank Alvau.
13. Affidavit of Humbert Rossi.

14. Affidavit of J. Charles Stanley. [138]
15. Motion in arrest of judgment.
16. Motion for new trial.
17. Order denying motion for new trial and in arrest of judgment.
18. Sentence and judgment of court.
19. Notice of appeal.
20. Order allowing appeal.
21. Citation on appeal.
22. Petition for appeal.
23. Bonds on appeal.
24. Stipulation for extending time for lodging bill of exceptions, extending term of court and for lodging record.
25. Order extending time for lodging bill of exceptions, extending term of court, and for lodging record.
26. Assignments of error.
27. Bill of exceptions.
28. Order settling and allowing bill of exceptions.
29. Praecipe for appellate record.
30. Clerk's certificate.

EDWARD H. CHAVELLE,  
JOHN B. WRIGHT,

Attorneys for Defendants.

[Endorsed]: Filed Dec. 13, 1928. [139]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT  
COURT TO TRANSCRIPT OF RECORD.

United States of America,  
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from to to 139, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true, and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's Fees (Act Feb. 11, 1925) for making	
record, certificate or return, 324 folios	
at 15¢ .....	\$49.60

Certificate of Clerk to Transcript of Record with seal .....	.50
Certificate of Clerk to Original Exhibits, with seal .....	.50

Total.....\$49.60

I hereby certify that the above cost for preparing and certifying record, amounting to \$49.60, has been paid to me by the attorney for the appellant.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 8th day of February, 1929.

[Seal]

ED. M. LAKIN,

Clerk U. S. District Court, Western District of Washington.

By S. M. H. Cook,  
Deputy. [140]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States of America, to the United States of America, and to ANTHONY SAVAGE, United States Attorney for the Western District of Washington, Northern Division, GREETING:

You are hereby cited and admonished to be and

appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, within thirty days from date hereof, pursuant to notice of appeal and order thereon, filed in the office of the Clerk of the District Court of the United States for the Western District of Washington, Northern Division, wherein the said Frank Alvau and Humbert Rossi are plaintiffs in error, and the United States of America is defendant in error, to show cause, if any there be, why judgment should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable GEORGE M. BOURQUIN, Judge of the District Court of the United States for the Western District of Washington, Northern Division, this 13th day of December, 1928.

[Seal]

BOURQUIN,  
Judge.

Received a copy of the within Citation on Appeal this 12th day of Dec. 1928.

ANTHONY SAVAGE,  
Attorney for \_\_\_\_\_.

[Endorsed]: Filed Dec. 13, 1928. [141]

[Endorsed]: No. 5746. United States Circuit Court of Appeals for the Ninth Circuit. Frank Alvau and Humbert Rossi, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed March 4, 1929.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

